FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 79

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 13, 1955

CERTIORARI GRANTED OCTOBER 10, 1955

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Karl Saier	46a	48a	53a	54a
			59a	67a
Delmar Hoagland	70a	87a		
Thomas Brooks	93a	105a	112a	117a
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Frank R. McCoy	152a	160a	164a	
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Robert Clifford Yeager	189a	190a		
George Mialback	193a	198a	201a	201a
Jim Lueke	203a	208a	210a	
Joseph P. Parrish	211a	214a		

EVIDENCE FOR GENERAL COUNSEL (Cont'd)

	Direct	Cross	Redirect	Recross
Thomas C. Aikins	215a	218a		
Karl Saier (Recalled)		220a		
William Trice	372a	374a		
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	Direct	Cross	Redirect	Recross
Martin F. Schmidt	225a	242a		249a
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Carl Bunning, Sr.	267a	273a		
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COCA-COLA BOTTLING COMPANY OF LOUISVILLE, INC.

Case No. 9-CA-418

5.17.51 Charge filed.

10.16.51 First amended charge filed.

10.16.51 Complaint and notice of hearing issued.

10.22.51 Respondent's motion to dismiss received.

10.22.51 Motion to set aside notice of hearing, and to cancel hearing, and to extend time for further pleading by Respondent, received.

10.31.51 Order rescheduling hearing and extending time for filing answer, and denying Respondent's motion to cancel hearing and set aside notice of hearing issued.

10.31.51 Order referring to Trial Examiner Respondent's motion to dismiss complaint issued.

10.31.51 Respondent's motion for production of documents received.

10.31.51 Respondent's motion to strike received.

10.31.51 Respondent's motion to make complaint more definite and certain received.

11. 1.51 Order to Trial Examiner for ruling on Respondent's motion for production of documents, motion to strike, and motion to make complaint more definite and certain issued.

11. 6.51 Order on motion to dismiss complaint issued.

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11. 6.51	Order on Respondent's motion for production of documents issued.
11. 6.51	Order on Respondent's motion to strike certain allegations of the complaint issued.
11. 6.51	Order on Respondent's motion to make complaint more definite and certain issued.
11. 9.51	Regional Director's Statement issued.
11.14.51	Respondent's motion to reschedule hearing received.
11.20.51	Respondent's answer received.
11.23.51	Regional Director's Order rescheduling hearing issued.
12.14.51	Telegraphic Order changing time of hearing issued.
12.17.51	Respondent's application for subpoenas dated.
12.17.51	Order designating Charles L. Ferguson Trial Examiner for the National Labor Relations Board issued.
12.17.51	Hearing opened.
12.19.51	Subpoena duces tecum served on Mrs. Della McIntosh.
12.21.51	Hearing adjourned until January 7, 1952.
12.26.51	Subpoena duces tecum served on Honorable Maurice Tobin.
12.26.51	Subpoena duces tecum served on Honorable Paul Herzog.
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1. 5.52	Respondent's response to petition of Paul M. Herzog and Jack G. Evans to revoke subpoena duces tecum Nos. B 15067 and B 15068 received.
1. 5.52	Respondent's response to petition to revoke subpoena duces tecum No. B 15066 issued to Maurice Tobin received.
1.16.52	Hearing continued.
1.16.52	Hearing closed.
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2.20.52	Trial Examiner's order granting joint motion to correct transcript of hearing issued.
3.28.52	Respondent's proposed findings of fact received.
6.30.53	Trial Examiner's Intermediate Report issued.
7. 1.53	Order transferring case to the National Labor Relations Board dated.
8.17.53	Respondent's exceptions to Intermediate Report received.
4.23.54	Board's Decision and Order issued.

United States of America

Before the

NATIONAL LABOR RELATIONS BOARD

Ninth Region

In the Matter of: Coca-Cola Bottling Company of Louisville, Inc. and United Brewery & Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO.	Case No. 9-CA-418

COMPLAINT

It having been charged by United Brewery & Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO, herein called the Union, that Coca-Cola Bottling Company of Louisville, Inc., herein called the Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as defined in the National Labor Relations Act, as amended (Pub. Law 101, 80th Cong., Chap. 120, 1st Sess.), herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for the Ninth Region of the Board, designated by the Board's Rules and Regulations, Series 6, Section 102.15, issues this Complaint and alleges as follows:

1. The Respondent, a corporation organized and existing under and by virtue of the laws of the State of Ken-

tucky, has its offices and only place of business at Louisville, Kentucky where it is engaged in the bottling and sale of soft drinks.

2. The Respondent, in the course and conduct of its business as described in Paragraph 1 above, causes and has caused at all times material hereto, a substantial quantity of the materials, supplies and equipment used by it to be purchased and transported in interstate commerce into the State of Kentucky from and through states of the United States other than the State of Kentucky. A substantial quantity of the products manufactured by the Respondent at its Louisville, Kentucky plant are shipped by it to, and destined for points outside of said State.

3. The Union is a labor organization as defined in Section 2(5) of the Act.

4. The Respondent discharged its employees named below on the dates specified after their respective names, and since said discharges has failed and refused to reinstate said employees because of their membership in, sympathy for, and activity on behalf of the Union, and for the purpose of discouraging membership in, sympathy for, and activity on behalf of the Union:

Delmar Hoagland	—	April 28, 1951
Thomas Brooks	—	May 12, 1951
Frank Kamenish	—	May 5, 1951

5. The Respondent, commencing on or about April 25, 1951 and at all times thereafter, interfered with, restrained and coerced, and is now interfering with, restraining and coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act by, inter alia:

a. Questioning its employees concerning their union membership, sympathy, and activities.

b. Threatening to discharge its employees and to take other economic reprisals against them for the purpose of discouraging membership in, sympathy for, and activity on behalf of the Union.

c. Advising and informing its employees that Respondent was aware of their membership in, sympathy for, and activities on behalf of the Union, for the purpose of discouraging membership in, sympathy for, and activity on behalf of the Union.

d. Preparing, circulating, causing to be circulated and soliciting its employees to sign a petition or statement to the effect that they did not wish to be represented by any labor organization, for the purpose of coercing them to resign from membership in the Union.

e. Directing and suggesting to its employees that they engage in surveillance of the Union activities of fellow employees and report information so secured to it.

6. By reasons of the acts set forth in Paragraph 4 above, and by each of them, Respondent did engage in, and is now engaging in unfair labor practices within the meaning of Section 8, Subsection (a)(3) of the Act.

7. By reasons of the acts set forth in Paragraphs 4 and 5 above, and by each of them, Respondent did engage in and is now engaging in unfair labor practices within the meaning of Section 8, Subsection (a)(1) of the Act.

8. The acts and conduct of the Respondent as described in Paragraphs 4 and 5 above, occurring in connection with the operations of the Respondent as described in Paragraphs 1 and 2 above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several states of the United States and tend to lead

to labor disputes burdening and obstructing commerce and the free flow of commerce.

9. The aforementioned acts of the Respondent constitute unfair labor practices affecting commerce within the meaning of Section 8, Subsections (a)(1) and (a)(3), and Section 2, Subsections (6) and (7) of the Act.

Wherefore the General Counsel of the National Labor Relations Board on behalf of the Board issues this Complaint against Coca-Cola Bottling Company of Louisville, Inc., the Respondent herein.

Dated at Cincinnati, Ohio this 16th day of October, 1951.

(s) Jack G. Evans,
Regional Director, Ninth Region,
National Labor Relations Board.

MOTION TO DISMISS COMPLAINT

Comes the respondent, Coca-Cola Bottling Company of Louisville, Incorporated, by counsel, and states that the allegations and exhibits contained in and attached to the purported complaint issued herein under date of October 16, 1951, are not sufficient to establish or show that the National Labor Relations Board, or its General Counsel, had or has jurisdiction, power and authority to issue a complaint herein or to conduct a hearing thereon or otherwise maintain this proceeding, for the following reasons:

(1) Said complaint does not allege that United Brewery and Soft Drink Workers Local No. 20 and the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, and the Congress of Industrial

Organizations, and each of them, are, and were at the time of the filing of the original and amended charges and also at the time of issuance of said complaint herein, in compliance with all of the requirements contained in subsections (f) and (g) of Section 9 of the Labor-Management Relations Act of 1947;

(2) Said complaint does not allege that each of the respective officers of the United Brewery and Soft Drink Workers Local No. 20, and of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, and of the Congress of Industrial Organizations (including W. B. Taylor, Regional Director of the Congress of Industrial Organizations for Kentucky) are, and were at the time of the filing of the original and amended charges, and also at the time of the issuance of said complaint herein, in compliance with all the requirements contained in subsection (h) of Section 9 of the Labor-Management Relations Act of 1947;

(3) There has not been filed as part of the record in this case and furnished to the respondent, either as exhibits to said complaint or otherwise, true and correct copies of all or any documents, if any, purporting to have been filed by United Brewery and Soft Drink Workers Local No. 20, and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, and the Congress of Industrial Organizations with the Secretary of Labor of the United States of America pursuant to subsections (f) and (g) of Section 9 of the Labor-Management Relations Act

of 1947, and duly certified by said Secretary of Labor as such;

(4) There has not been filed as part of the record in this case and furnished to the respondent, either as exhibits to said complaint or otherwise, true and correct copies of all or any documents, if any, purporting to have been filed by each of the respective officers of United Brewery and Soft Drink Workers Local No. 20, and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, and the Congress of Industrial Organizations (including W. B. Taylor, Regional Director of the Congress of Industrial Organizations for Kentucky) with the National Labor Relations Board pursuant to subsection (h) of Section 9 of the Labor-Management Relations Act of 1947, and duly certified by said National Labor Relations Board as such;

(5) Filing with the Secretary of Labor of the United States of America, the documents described in subsections (f) and (g) of Section 9 of the Labor-Management Relations Act of 1947, and filing with the National Labor Relations Board the documents described in subsection (h) of said Section 9, constitute conditions precedent to any jurisdiction, power or authority of the National Labor Relations Board, or its General Counsel, to entertain or investigate the original and amended charges herein and to the issuance of the complaint herein and to the conducting of a hearing thereon, and the burden is upon the National Labor Relations Board and its General Counsel (complainants herein) to affirmatively and expressly allege and prove, if they can, compliance with all the-

provisions of subsections (f), (g) and (h) of Section 9 of the Act as aforesaid, and to make all such allegations and evidence part of the record in this case so that the respondent can subject same to scrutiny, investigation, attack and judicial review.

Wherefore the respondent, Coca-Cola Bottling Company of Louisville, Incorporated, moves that the purported complaint herein be dismissed.

Coca-Cola Bottling Company of Louisville, Incorporated,
1661 W. Hill Street, Louisville, Kentucky.

By Counsel:

(s) John K. Skaggs, Jr.,
Kentucky Home Life Building,
Louisville, Kentucky,

(s) Martin R. Glenn,
Louisville, Kentucky.

The undersigned hereby certifies that a copy of the foregoing motion was served upon United Brewery and Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, by forwarding a copy thereof by registered United Stafes mail, postage prepaid, to said organization at 213-214 Coleman Building, Louisville, Kentucky, on this the 20 day of October, 1951.

(s) John K. Skaggs, Jr.

ORDER ON MOTION TO DISMISS COMPLAINT

Case No. 9-CA-418

The above entitled matter is an unfair labor practice proceeding under the Labor Management Relations Act, 1947, hereinafter referred to as the Act.

The Respondent has filed a motion to dismiss the complaint herein and said motion has been referred to the undersigned Trial Examiner for the National Labor Relations Board for consideration and disposition.

Respondents said motion avers, in substance, that the complaint should be dismissed for the following reasons: That is "does not allege that" United Brewery and Soft Drink Workers Local No. 20, the International Union, and the Congress of Industrial Organizations, named therein, "and each of them, are, and were at the time of the filing of the original and amended charges" and "at the time of issuance of said complaint, in compliance with all of the requirements" of subsections (f) and (g) of Section 9 of the Act or that "each of the respective officers" of each of said labor organizations are, and were at such times "in compliance with all requirements" of subsection (h) of said Section 9; and that the filing of the documents described in subsections (f) (g) and (h) of said Section 9, in accordance with the provisions and requirements thereof, "constitute conditions precedent to any jurisdiction, power, or authority" of the Board, or its General Counsel "to entertain or investigate" the charges herein, issue a complaint, or conduct a hearing, and that the "burden is upon the" Board and its General Counsel "to affirmatively and expressly allege and prove, if they can, compliance with all the provisions of subsections (f) (g) and (h) of Section 9."

Upon examination and consideration of the motion and the issues presented,

Order on Motion to Dismiss Complaint

It Is Ordered, that Respondent's said motion to dismiss the complaint be, and same is hereby, denied. Ann Arbor Press, 85 NLRB 58; NLRB v. Ann Arbor Press, (C. A. 6) 188 F. 2d 917, Certiorari denied by Supreme Court, October 22, 1951.

Dated at Washington, D. C.
November 6, 1951.

(s) Charles L. Ferguson,
Trial Examiner.

STATEMENT

Case No. 9-CA-418

Pursuant to Order of the Trial Examiner dated November 6, 1951, on Respondents' Motion To Make Complaint More Definite And Certain, the General Counsel by the Regional Director for the Ninth Region, hereby furnishes the names of Respondents' agents who committed the various specific acts or engaged in the conduct set forth in paragraph 5 of the Complaint:

5. (a) Clarence Sargeant, Carl H. Bunning, Carl Ferst, Martin F. Schmidt, Erwin Hartmann
   (b) Clarence Sargeant, Carl Ferst, William H. Miller, Paul Neal, Martin F. Schmidt
   (c) Erwin Hartmann, William H. Miller, Carl Ferst, Paul Neal, Clarence Sargeant, Martin F. Schmidt
   (d) Erwin Hartmann, William H. Miller
   (e) Carl Ferst

Dated at Cincinnati, Ohio, this 9th day of November, 1951.

Jack G. Evans,
Regional Director National Labor Relations Board, Ninth Region.

ANSWER

Case No. 9-CA-418

For its answer herein the Respondent, Coca-Cola Bottling Company of Louisville, Incorporated, without waiving its motion to dismiss complaint, or its motion for production of documents, or its motion to strike, or its motion to make complaint more definite and certain, or its motion to re-schedule hearing, now states as follows:

1. The Respondent denies each and every allegation contained in the complaint issued under date of October 16, 1951, and in the original charge filed on May 17, 1951, and in the first amended charge filed on October 16, 1951, and in the "Statement" issued by the Regional Director on behalf of the General Counsel under date of November 9, 1951, pursuant to order of the Trial Examiner dated November 6, 1951, except that the Respondent admits the following allegations contained in the complaint:

   (a) Paragraph numbered 1 in its entirety;

   (b) The first literary sentence of paragraph numbered 2.

2. For further answer the Respondent states it believes and therefore affirmatively alleges that neither the United Brewery & Soft Drink Workers Local No. 20 nor the International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America nor the Congress of Industrial Organizations have filed and now have on file with the Secretary of Labor of the United States of America any or all of the documents, statements, material and data required by subsections (f) and (g) of Section 9 of the Labor-Management Relations Act of 1947, and that each of the respective officers of said organizations (including W. B. Taylor, Regional Director of the Congress

of Industrial Organizations in Kentucky) has not executed and filed with the National Labor Relations Board, and does not now have on file with said Board, the affidavits required by subsection (h) of Section 9 of said Labor-Management Relations Act, and that, by reason of non-compliance with said provisions of said Act the National Labor Relations Board, and its General Counsel, are without jurisdiction, power and authority to entertain or process the original or amended charge herein, or to investigate same, or to issue a complaint herein, or to hold any hearing in connection therewith, or to issue any order thereon.

(3) For further answer the Respondent also states that it believes and therefore affirmatively alleges that it is not bound by any purported administrative determination made by the National Labor Relations Board, or by its General Counsel or other officers or agents, to the effect that said organizations and their respective officers are in compliance with subsections (f), (g) and (h) of Section 9 of the Labor-Management Relations Act of 1947, and that the Respondent is entitled to inspect and examine, and to have filed in the record of this case, duly authenticated true and correct copies of any and all documents, statements, material, data and affidavits which the complainant or the National Labor Relations Board, or any officer or agent thereof, or the charging party, claims to have been filed by the above named organizations and each of their respective officers pursuant to said provisions of said Act. The Respondent has made demands therefor but said demands have been improperly, wrongfully and unlawfully denied; the Respondent hereby reasserts its rights and renews its demands as aforesaid.

(4) For further answer the Respondent also states it believes and therefore affirmatively alleges that the Na-

tional Labor Relations Board, and its General Counsel and other officers and agents, have acted and are acting in an arbitrary, oppressive, improper and unlawful manner by refusing to furnish the Respondent with information to which it is lawfully entitled and by refusing to allow to the Respondent reasonable time in which to prepare its case and by proceeding without jurisdiction, power or authority, and by denying to the Respondent due process of law and other rights to which it is entitled under the said Labor-Management Relations Act of 1947 and the Constitution of the United States of America.

Wherefore the Respondent, Coca-Cola Bottling Company of Louisville, Incorporated, prays that the complaint be dismissed.

John K. Skaggs, Jr.,
Martin R. Glenn,
Both of Louisville, Kentucky,
Counsel for Coca-Cola Bottling Company of Louisville, Incorporated.

The undersigned, Martin F. Schmidt, states that he is Vice President of Coca-Cola Bottling Company of Louisville, Kentucky, and that the statements contained in the foregoing answer are true to the best of his knowledge and belief.

Martin F. Schmidt.

Certification

State of Kentucky)
County of Jefferson)

Sworn and subscribed to by Martin F. Schmidt before me on this the 17th day of November, 1951.

My commission expires Nov. 19, 1953.

Christine Lawrence,
Notary Public, Jefferson County,
Kentucky.
(Notarial Seal)

The undersigned certifies that the foregoing answer was served on United Brewery & Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, by forwarding a copy thereof by registered United States mail, postage prepaid, to its attorney, Mr. James C. Paradise, Station E, Box 28, Cincinnati 19, Ohio, on this the 19 day of November, 1951.

John K. Skaggs, Jr.

GENERAL COUNSEL'S EXHIBIT No. 3-A

* * * * * * *

ARTICLE III

MEMBERSHIP

Qualification and Obligation

Sec. 1. Every employee engaged in the Brewery, Malt, Flour, Grain, Elevator, Yeast, Syrup, Vinegar, Alcohol, Winery, Cider, Cereal, Beverage, Mineral Water and Distillery industries, of good, recommendable character, who joins a Local Union, and subscribes to the constitution of

said Local Union and also that of the International Union becomes thereby a member of the International Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers of America.

Sec. 2. Candidates for membership are required to truthfully answer all questions upon the official membership application. Should any statement on this application be proven false, it shall be sufficeint cause for expulsion from the organization.

Sec. 3. Candidates who were former members can be accepted only in accordance with Sections 19 and 20 of Article IV of this Constitution.

Sec. 4. No local union may initiate an applicant unless the applicant is employed in one of the industries coming under the jurisdiction of the International Union.

Sec. 5. (a) Every candidate, not a native born citizen of the United States or Canada, who desires to become a member of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, must be in possession of his first citizenship papers, and he must obtain his second papers at such time as he legally is entitled to do so. This provision must be enforced rigidly through a yearly revision, to be held by every Local Union on October 1.

(b) It is the inherent duty of every citizen of the nation to use the right of suffrage at the ballot box when physically able to do so.

(c) Members who refuse to do so or make no effort to comply with this section may be suspended.

Sec. 6. (a) Members who are advanced to the position of foreman, having the right to hire and discharge, and who do not perform the regular work of a workingman, cannot hold membership in the International Union.

General Counsel's Exhibit No. 3-A

(b) First men in the various departments are eligible to membership in the Union and shall, whenever possible, be included in the bargaining unit.

(c) Checkers, watchmen, maintenance men, janitors and shipping clerks shall be eligible to membership in the Union and, to the extent permitted by law, shall be included in the bargaining unit; bookkeepers and other office employees shall be eligible to membership in the Union.

(d) Stockholders and sons of employers or managers, in establishments under contract, who perform manual labor coming under the jurisdiction of the International Union, shall be eligible to membership within the discretion of the local union.

Sec. 7. (a) Each Local Union shall elect an Examination Committee of three or more members, whose duty it shall be to examine each applicant for membership, as to his competence and character.

(b) No member of the Communist Party or any other proven subversive political party or organization shall be eligible to hold membership, or be permitted to hold office in any capacity in the International Union or any affiliated local unions and branches.

(c) Any applicant who fails to pass the examination required cannot be accepted to membership.

Sec. 8. After a Local Union has cast a majority vote favorable to a candidate's application for membership and the candidate has complied with the requirements of the Union, the candidate shall be led before the Chairman. The Chairman shall read and the candidate shall repeat the following obligation:

> "I (give name) hereby pledge my word of honor as a man that I will be true to this Union and its principles as long as I am a member thereof; that I will

faithfully comply with all the provisions of the International Constitution and Bylaws of this Local Union; that I will do all in my power to promote the welfare of this Union and that I will consider every one of its members as my friend and brother; that I will not reveal any business or proceedings of any meeting of this Union except to those who have a right to such knowledge; that I will comply with the orders, regulations and laws of this Union and that I will at all times abide by the regulations and decisions of the General Executive Board of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America; that should I fail to keep these promises I shall be punished with expulsion from this union."

Sec. 9. After a candidate has been obligated the Chairman shall read the following to him:

"It is the duty of every member to purchase none but union-made goods and to patronize Union places of business and entertainment. Special attention shall be paid to the Union Label and the Union Show Card and Button."

* * * * * * *

GENERAL COUNSEL'S EXHIBIT No. 3-B

* * * * * * *

ARTICLE II

QUALIFICATIONS, INITIATION AND OBLIGATION

Section 1. Only such persons who are of good recommendable character and are in possession of their first citizenship papers, recommended by two goodstanding members of this Local Union, who subscribe to the Constitution of the International Union and the Constitution and By-Laws of this local union, and who have been found competent by an investigating committee, are entitled to admission to this Union.

Section 2. Candidates for membership are required to truthfully answer all questions upon the official membership application. Should any statement on this application be proven false, it shall be sufficient cause for expulsion. Half of the initiation fee must accompany the application.

Section 3. If objection is raised to the acceptance or rejection of a candidate final action shall be laid over until the next meeting, and the Local Executive Board shall call a meeting of the investigating committee of the candidate, the members offering the objections and the candidate; the committee shall give its reasons for its report and the objecting members the cause of their objection. The finding of the Local Executive Board shall be reported to the Local Union. If the report is favorable the candidate shall become a member upon receiving a majority vote of the members present at the meeting. The rejection of a candidate shall remain in effect for six months, and any part of the initiation fee paid by him shall be refunded unless the cause for rejection has been removed.

Section 4. Any member expelled from this local union may be readmitted upon payment of all back dues or new

General Counsel's Exhibit No. 3-B

initiation fee, and an assessment not to exceed ten dollars, providing this local union sees fit. Candidates who were former members can be accepted only in accordance with Sections 19 and 20 of Article IV of the International Constitution.

Section 5. The second half of the initiation fee must be paid before the candidate is initiated, unless otherwise agreed upon. General or special meetings can, by a majority vote, grant candidates without means time to pay the initiation fee.

Section 6. After the Union has voted favorably upon the candidate's acceptance to membership and the candidate has complied with the requirements of the Union, the candidate shall be led before the chairman. The chairman shall read and the candidate shall repeat the following obligation:

"I (give name) hereby pledge my word of honor as a man that I will be true to this Union and its principles as long as I am a member thereof; that I will faithfully comply with all the provisions of the International Constitution and the Constitution and By-Laws of this local union; that I will do all in my power to promote the welfare of this Union and that I will consider every one of its members as my friend and brother; that I will not reveal any business or proceedings of this Union except to those who have a right to such knowledge; that I will comply with the orders, regulations and laws of this Union, and that I will at all times abide by the regulations and decisions of the General Executive Board of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America; that should I fail to keep these promises I shall be punished with expulsion from this Union."

General Counsel's Exhibit No. 3-B

Section 7. After a candidate has been obligated, the chairman shall read the following to him:

"It is the duty of every member to purchase none but union-made goods and to patronize Union places of business and entertainment. Special attention shall be paid to the Union Label, and the Union Show Card and Button."

* * * * * * * *

GENERAL COUNSEL'S EXHIBIT No. 4

May 7, 1951

Coca-Cola Bottling Company
Louisville, Ky.
Attention: Mr. Martin F. Schmidt, Jr.

Dear Sir:

The overwhelming majority of workers (Maintenance, Production and Delivery) employed at your plant has seen fit to sign cards designating the United Soft Drink & Brewery Workers Local 20, CIO as their collective bargaining agent. We are therefore, formally requesting to set a date for a conference in which representatives of your Company and representatives of our Union, which will include your employees, shall negotiate a collective bargaining agreement that has to do with the wages, working conditions and job security of the aforementioned employees.

We sincerely hope that the requested conference will be immediately forthcoming and that they will result in a collective bargaining agreement that will be good for the employees of your Company and the Company itself.

Yours sincerely,
Karl Saier

GENERAL COUNSEL'S EXHIBIT No. 5

COCA-COLA BOTTLING COMPANY
of Louisville, Ky.
Office and Plant, 1661 W. Hill Street
Louisville 10, Kentucky

May 10, 1951

Mr. Karl Saier, Secretary
International Union of United Brewery,
Flour, Cereal, Soft Drink and
Distillery Workers of America
213-14 Coleman Building
Louisville, Kentucky

Dear Mr. Saier:

Your letter of May 7, 1951 was received on May 8, 1951.

This company does not believe that your Union represents even a substantial portion of its employees.

If you desire, you may contact the company's counsel, Mr. John K. Skaggs, Jr., 19th Floor Kentucky Home Life Building, telephone Wabash 6614. Mr. Skaggs will arrange a mutually convenient date to meet with you.

You are to understand that this does not amount to a recognition of your Union in any capacity whatsoever.

Very truly yours,
Coca-Cola Bottling Co. of Louisville
By (s) Martin F. Schmidt
Vice President

RESPONDENT'S EXHIBIT No. 3

SUB-CLASS | ROUTE | RURAL | URBAN | FOOD | EAT | DRUG | T.L. | DEPT | S.S. | AUTO | P.S. | INST. | AMUS | E&W | OFF. | IND. | SPEC. | A.F. | MISC.

ACCOMPLISHMENT-DATE

COOLERS SOLD

COOLERS DISPLAYED

STD REFRS SOLD

OUTSIDE ADV. PLACED

INSIDE ADV. PLACED

SERVICE INCREASED

CARTONS DISPLAY

DEALER: S & S

DEALER NO.

ADDRESS: G. LOWER BLUFF

ROUTE NO.

CITY: ~~TOAGLAND~~

STATE

CLASSIFICATION

SERVICE

TYPE COIN COOLER

YEAR	SALES	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL	INCREASE	DECREASE
	CASES	1986	3104	3839	4224	5324	5261	6680	6047	4175	4516	3769	3795	56721		
	CARTONS												488	488		
	CASES	3519	3291	3980	4777	6452	7854	5253	5289	4259	4514	3287	3559	56634	2216	
	CARTONS	460	480	443												
	CASES	3417	3428	3708	4678	5839	6[illegible]	6110	6374	4939	4994	3818				
	CARTONS															
	CASES															
	CARTONS															
	CASES															
	CARTONS															

STANDARD MERCHANDISING
AND
DEALER CASE SALES RECORD CARD

FORM CC-25

DEALER NO: UNITS 1 2 4 7 | TENS 1 2 4 7 | HUNDREDS 1 2 4 7

DEALER NO: UNITS 1 2 4 7 | TENS 1 2 4 7 | HUNDREDS 1 2 4 7

25 26

T Y ▼ 2810

RESPONDENT'S EXHIBIT No. 4

(Emblem)

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C.

June 25, 1951

Mr. James K. Skaggs, Jr.,
Skaggs, Hays & Fahey,
Kentucky Home Life Building,
Louisville 2, Kentucky.

Re: Coca-Cola Bottling Co. of Louisville
Case 9-CA-418

Dear Mr. Skaggs:

I have your letter of June 14, 1951, to George J. Bott, General Counsel, relative to the filing requirements of Section 9(f), (g) and (h) of the Labor Management Relations Act, 1947.

The material submitted by the Congress of Industrial Organizations, the International Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, and Local 20 thereof, is on file in this office.

In accordance with the request contained in your letter this material may be inspected, by you or your representative, in this office at any time at your convenience.

Very truly yours,
William O. Murdock
Associate General Counsel

RESPONDENT'S EXHIBIT No. 5

January 16, 1952

General Counsel
National Labor Relations Board
Washington, D. C.

In re: Docket No. 9-CA-418, Coca Cola Bottling Co. of Louisville, Ky., Inc., and Local 20, United Brewery and Soft Drink Workers, et al.

Dear Sir:

As counsel for Coca Cola Bottling Company of Louisville, Kentucky, Inc., I request that you furnish me the following information concerning the following-named unions: United Brewery and Soft Drink Workers, Local 20 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America; the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America; and the Congress of Industrial Organizations.

The information requested is: (a) the name and title of each officer of the three above-named unions who have filed non-communist affidavits with you. (b) the dates upon which each officer filed such affidavit. (c) the any and all dates upon which you consider any or all of the named unions not to be in compliance and the reasons why such unions were not in your opinion in compliance. (b) a statement as to whether or not W. B. Taylor, Regional Director of the CIO for the Louisville, Kentucky, Region, has filed a non-communist affidavit which is now in force and effect and a statement as to whether or not the said Taylor has ever filed a non-communist affidavit. (e) full information concerning the compliance of the three above-

Respondent's Exhibit No. 5

named unions with the filing requirements as to financial data and information required by the Act.

Sincerely yours,
John K. Skaggs, Jr.
Kentucky Home Life Building
Louisville, Kentucky

You will understand that in making this request, I no-wise waive our claimed and asserted right to personally inspect these basic records and/or to have certified copies of same furnished to me.

RESPONDENT'S EXHIBIT No. 6

(Emblem)

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C.

January 16, 1952

John K. Skaggs, Jr.,
Kentucky Home Life Building,
Louisville, Ky.

In re: Docket No. 9-CA-418, Coca Cola Bottling Co. of Louisville, Ky., Inc., and Local 20, United Brewery and Soft Drink Workers, et al.

Dear Sir:

In reply to your request of today for information concerning the compliance status of Congress of Industrial Organizations, United Brewery and Soft Drink Workers, Local 20 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America and the International Union of United Brewery, Flour,

Respondent's Exhibit No. 6

Cereal, Soft Drink and Distillery Workers of America, the following information is furnished.

United Brewery and Soft Drink Workers, Local 20 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, was in compliance on October 16, 1951, when the complaint in this case was issued, remained in compliance until December 27, 1951, was out of compliance until January 9, 1952, when it returned to compliance. The compliance of this union will expire March 27, 1952. The officers are as follows, all of whom have filed non-communist affidavits:

Title	Name
President	Stanley Gruneisen
Vice President	Chas. Pero, Jr.
Recording Sec'y	James Phillips
Corresponding Sec-Treasurer and Business Agent	John W. Tierney, Jr.
Assist. Corresponding Sec-Treas. & Bus. Agent	Thomas Gray
Sgt. at Arms	Henry Buetel
Trustee	Leo Lingenfelter
Trustee	Curtis James
Auditor	James Rogalinski
Auditor	Leo Hefferman
Auditor	William Lanehan
Delegate CIO Counsel	Eugene Eddleman
Brewery Dept. Rep.	Ernest Coones
Bottling Dept. Rep.	Herman Heun
Power Dept. Rep.	Theo Holzknecht
Delivery Dept. Rep.	Vacant

International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America was in compliance on October 16, 1951, when the complaint in this case was issued, and has remained in continuous compliance. The current compliance of this union expires July 24,

Respondent's Exhibit No. 6

1952. The officers are as follows, all of whom have filed non-communist affidavits:

Title	Name
Int'l. President	Karl F. Feller
Gen. Sec'y-Treas.	Joseph J. Hauser
General Organizer	Charles H. Lindberg
Gen. Corr.-Rec. Sec'y	Edward Hughlett

Congress of Industrial Organizations was in compliance on October 16, 1951, when the complaint in this case was issued, and has remained in continuous compliance. The current compliance of this union expires September 30, 1952. The officers are as follows, all of whom have filed non-communist affidavits:

Title	Name
President	Philip Murray
Sec'y-Treas.	James B. Carey
Vice President	L. S. Buckmaster
"	Joseph Curran
"	Allan S. Haywood
"	Walter P. Reuther
"	Emil Rieve
"	Frank Rosenblum
"	O. A. Knight
"	Joseph A. Beirne
"	Michael Quill

With reference to W. B. Taylor, Regional Director of the CIO for the Louisville, Kentucky Region, he is not listed as an officer of any of the above labor organizations and we have no record on him.

All three organizations listed above are now in compliance and were in compliance when the complaint in this case was issued on October 16, 1951.

Very truly yours,
William O. Murdock
Associate General Counsel

TRIAL EXAMINER'S EXHIBIT No. 4

PETITION TO REVOKE SUBPOENAS

Now comes Paul M. Herzog, Chairman of the National Labor Relations Board, Washington 25, D. C., and Jack G. Evans, Regional Director, Ninth Region, National Labor Relations Board, 1200 Ingalls Building, Cincinnati 2, Ohio, by Leonard S. Kimmell, Attorney, and respectfully move the Trial Examiner, the Honorable Charles L. Ferguson, to revoke Subpoenas Duces Tecum, B-15067 and B-15068, issued by the Trial Examiner on behalf of the National Labor Relations Board on the 18th day of December, 1951, at Louisville, Kentucky, wherein the said Paul H. Herzog and Jack G. Evans are commanded to appear at the Hearing in the above-styled case to be held on January 7, 1952 at Washington, D. C. and produce at that time certain affidavits filed by the above-mentioned labor organization pursuant to Section 9, Sub-section (h) of the National Labor Relations Act, as amended, for the following reasons:

The documents directed to be produced in this Hearing by said subpoenas are irrelevant and immaterial to the issues involved since compliance with Section 9, Sub-section (h) of the Act is a matter for administrative determination by the Board and is not litigable by the parties. Red Rock Company, 84 NLRB 521, ftn. 2, enf., 187 F. 2d 76 (C. A. 5); Illinois Bell Telephone Company, 88 NLRB 1171, ftn. 3, enf. denied on other grounds, —— F. 2d ——, 28 LRRM 2079; Comfort Spring Corporation, 90 NLRB 173, 177; Hibriten Chair Company, Incorporated, 95 NLRB No. 168, 28 LRRM 1430; Mine Safety Appliance Company, 85 NLRB 290, ftn. 1; Tanners Association of Fulton County, 87 NLRB 211, ftn. 2. Also see NLRB v. Greensboro Coca-Cola Bottling Company, 180 F. 2d 840 (C. A. 4); Arthur J. Wiltse, d/b/a Ann Arbor Press, 85 NLRB 58, enf. 188 F. 2d 917 (C. A. 6),

cert. denied —— U. S. ——; Law & Son v. NLRB, —— F. 2d —— (C. A. 10), 29 LRRM 2011; McComb Manufacturing Company, 95 NLRB No. 82, 28 LRRM 1351; Intertown Corp., 90 NLRB 1145, ftn. 2; Ray Smith Transport Company, 89 NLRB 1045, ftn. 2.

The Trial Examiner is respectfully requested to rule on this Petition at the earliest possible date so that the parties may be advised in sufficient time to properly prepare for the Hearing which was adjourned to January 7, 1952, for the express purpose of determining this issue.

Respectfully submitted,

Leonard S. Kimmell, Attorney,
Ninth Region,
National Labor Relations Board,
1200 Ingalls Building,
Cincinnati, Ohio.

TRIAL EXAMINER'S EXHIBIT No. 5

PETITION TO REVOKE SUBPOENA DUCES TECUM

The petition of John J. Babe', Esq., Acting Solicitor of the Department of Labor, acting on behalf of Maurice J. Tobin, Secretary of Labor, hereby petitions for the revocation of a Subpoena Duces Tecum issued to said Maurice J. Tobin dated December 18, 1951, which Subpoena Duces Tecum requires the production of certain records filed under Section 9 of the Labor-Management Relations Act of 1947 before Charles L. Ferguson, a Trial Examiner, on the seventh day of January, 1952, on the following grounds:

(1) Compliance with such Subpoena would be in violation of the regulations of the Department of Labor, and

Trial Examiner's Exhibit No. 5

specifically the regulations contained in Title 29, Code of Federal Regulations, part 2.4. Such information can only be furnished on the request of the Board itself. The Subpoena Duces Tecum referred to above was issued on request of a party to the proceeding and is not information which is being sought by the Board but by one of the parties thereto, to-wit, the Coca-Cola Bottling Company of Louisville, Inc.

(2) The matters called for in the Subpoena Duces Tecum are too vague, general, broad and indefinite, and compliance therewith would place an undue and unnecessary burden on the Secretary of Labor and the Department of Labor.

(3) The documents called for in the Subpoena Duces Tecum are irrelevant and immaterial to the issues involved in the proceeding.

Wherefore, your petitioner respectfully asks that the Subpoena referred to be revoked.

John J. Babe'

TRIAL EXAMINER'S EXHIBIT No. 9

RESPONSE TO PETITION OF PAUL M. HERZOG AND JACK G. EVANS TO REVOKE SUBPOENAS DUCES TECUM Nos. B15067 AND B15068

Comes herein Coca-Cola Bottling Company of Louisville, Inc. by its counsel, John K. Skaggs, Jr., and responds to the Petition to Revoke Subpoena herein filed on or about December 28, 1951 and states as follows:

1. The documents directed to be produced in this hearing by said subpoenas are both relevant and material to the issues involved herein.

Trial Examiner's Exhibit No. 9

2. While the Board may determine for its own purposes whether or not there has been compliance with the Act, same is subject to judicial review. NLRB v. Highland Park Mfg. Co., 341 U. S. 322, 71 S. Ct. 758-760, 761.

3. The answer of respondent Coca-Cola Bottling Company of Louisville, Inc. (General Counsel's Exhibit 2D) specifically alleges (a) that the charging Unions in this proceeding are not in compliance with the applicable provisions of the Labor-Management Relations Act of 1947; are not labor organizations within the meaning of the Labor-Management Relations Act of 1947, and (c) the respondent has made demands for the production of the documents called for in the said subpoenas duces tecum and or the right to examine same, which demands have been improperly, wrongfully and unlawfully denied. Accordingly, therefore, there is raised an issue at law in addition to the procedural requirement, which is the subject of inquiry by the Courts. NLRB v. Highland Park Mfg. Co. supra, Pg. 761.

Wherefore the respondent Coca-Cola Bottling Company of Louisville, Inc. prays that the Petition to Revoke Subpoenas be dismissed.

Dated at Louisville, Kentucky, this 3rd day of January 1952.

Coca-Cola Bottling Company of
Louisville, Inc.,
Respondent,

By John K. Skaggs, Jr.,
Counsel for Respondent.

TRANSCRIPT OF TESTIMONY
December 17, 1951

BEFORE THE

NATIONAL LABOR RELATIONS BOARD
NINTH REGION

In the Matter of: Coca Cola Bottling Company of Louisville, Kentucky, Inc. and United Brewery & Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drinks & Distillery Workers of America, C.I.O.	Case No. 9-CA-418

Courtroom No. 1
Second Floor
U. S. Post Office Bldg.
Louisville, Kentucky
Monday, December 17, 1951

Pursuant to notice, the above-entitled matter came on for hearing at 1:15 o'clock P.M.

Before: Charles L. Ferguson, Esq., Trial Examiner.

Appearances:

Leonard S. Kimmell, Appearing for the National Labor Relations Board.

John K. Skaggs, Jr., Kentucky Home Life Bldg., of Skaggs, Hays and Fahey; and Martin R. Glenn, 620 South Third St., Louisville, Kentucky, appearing for the Company.

Karl Saier, Secretary and Business Agent, Local 20, 213-214 Coleman Bldg.; and W. B. Taylor, Regional Director CIO, 478 Starks Bldg., Louisville, Ky., appearing for the United Brewery and Soft Drink Workers.

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PROCEEDINGS

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Mr. Kimmell: I ask the reporter to mark for identification as General Counsel's Exhibit No. 1-A, a letter dated May 17, 1951, addressed to Coca Cola Bottling Company, and signed by Jack G. Evans, Regional Director, National Labor Relations Board.

(Thereupon the document here referred to was marked for identification as General Counsel's Exhibit 1-A.)

Mr. Kimmell: As General Counsel's Exhibit 1-B for identification, a document styled Affidavit of Service of Letter and Copy of Charge, Case No. 9-CA-418, bearing date of mailing

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as May 17, 1951, on which is attached a Registered Return Receipt indicating service upon the party named therein.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit No. 1-B.)

Proceedings

Mr. Kimmell: As General Counsel's Exhibit 1-C for identification, a document entitled Charge, Case No. 9-CA-418, signed by Karl Saier, and dated May 17, 1951, . . .

* * * * * * * *

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit No. 1-C.)

Mr. Kimmell: As General Counsel's Exhibit 1-D for identification, a document entitled First Amended Charge Against Employer, Case No. 9-CA-418, showing date of filing as October 16, 1951 and signed by James Paradise.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit No. 1-D.)

Mr. Kimmell: As General Counsel's Exhibit 1-E for identification, a document entitled Complaint, Case No. 9-CA-418, dated October 16, 1951, and signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit No. 1-E.)

Mr. Kimmell: As General Counsel's Exhibit 1-F for identification, a document entitled Notice of Hearing, Case No. 9-CA-418, dated October 16, 1951, and signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-F.)

Mr. Kimmell: As General Counsel's Exhibit 1-G for identification, a document entitled Affidavit of Service of

Notice of Hearing, Complaint, Copy of Charge Against Employer, Copy of First Amended Charge Against Employer, Case No. 9-CA-418, showing date of mailing as October 16, 1951, to which are attached Registered Return Receipts indicating service upon the parties named therein.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-G.)

Mr. Kimmell: As General Counsel's Exhibit 1-H for identification, a document entitled Motion to Dismiss Complaint Case No. 9-CA-418, dated October 20, 1951, and signed by John Skaggs, Jr. and Martin R. Glenn.

Trial Examiner Ferguson: Attorneys for Respondent, aren't they?

Mr. Kimmell: Yes, sir.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-H.)

Mr. Kimmell: As General Counsel's Exhibit 1-I for identification, a document entitled Motion to set Aside Notice

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of Hearing and to cancel hearing and to extend time for further pleading by Respondent, case No. 9-CA-418, dated October 20, 1951, and signed by John Skaggs, Jr. and Martin R. Glenn, attorneys for Respondent.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-I.)

Mr. Kimmell: As General Counsel's Exhibit 1-J for identification, a document entitled Order Rescheduling

Hearing and Extending Time for Filing Answer and Denying Respondent's Motion to Cancel Hearing and Set Aside Notice of Hearing, Case No. 9-CA-418, dated October 31, 1951 and signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-J.)

Mr. Kimmell: As General Counsel's Exhibit 1-K for identification, a document entitled Order Referring to Trial Examiner, Respondent's Motion to Dismiss Complaint, Case No. 9-CA-418, dated October 31, 1951 and signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-K.)

Mr. Kimmell: As General Counsel's Exhibit 1-L for identification, document entitled Affidavit of Service of Order Referring to Trial Examiner, Respondent's Motion to Dismiss Complaint, Order Rescheduling hearing and Extending Time

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for Filing Answer and Denying Respondent's Motion to Cancel Hearing and Set Aside Notice of Hearing, Case No. 9-CA-418, date of mailing, October 31, 1951, to which is attached Registered Return Receipts indicating service on the parties named therein.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-L.)

Mr. Kimmell: As General Counsel's Exhibit 1-M for identification, a document entitled Motion for Production

of Document, Case No. 9-CA-418, dated October 30, 1951, and signed by John Skaggs, Jr. and Martin R. Glenn, attorneys for Respondent.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-M.)

Mr. Kimmell: As General Counsel's Exhibit 1-N for identification, a document entitled Motion to Strike, Case No. 9-CA-418, dated October 30, 1951, and signed by John Skaggs, Jr. and Martin R. Glenn, attorneys for Respondent.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-N.)

Mr. Kimmell: As General Counsel's Exhibit 1-O for identification, a document entitled Motion to Make Complaint More Definite and Certain, Case No. 9-CA-418, dated October 30, 1951, signed by John Skaggs, Jr. and Martin R. Glenn, attorneys for Respondent.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-O.)

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Mr. Kimmell: As General Counsel's Exhibit 1-P identification, document entitled Order to Trial Examiner for Ruling, Respondent's Motion for Production of Document, Motion to Strike and Motion to Make Complaint More Definite and Certain, Case No. 9-CA-418, dated November 1, 1951, signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-P.)

Proceedings

Mr. Kimmell: As General Counsel's Exhibit 1-Q for identification, a document entitled Affidavit of Service of Order to Trial Examiner for Ruling on Respondent's Motion for Production of Documents, Motion to Strike and Motion to Make Complaint More Definite and Certain, Case No. 9-CA-418, showing date of mailing as November 1, 1951, to which are attached Registered Return Receipts indicating service upon the parties named therein.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-Q.)

Mr. Kimmell: As General Counsel's Exhibit 1-R for identification, a document entitled Order on Motion to Dismiss Complaint, Case No. 9-CA-418, dated November 6, 1951, and signed by Charles L. Ferguson, Trial Examiner.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-R.)

Mr. Kimmell: As General Counsel's Exhibit 1-S for identification, a document entitled Order on Respondent's Motion

for Production of Documents, Case No. 9-CA-418, dated November 6, 1951, and signed by Charles L. Ferguson, Trial Examiner.

(Thereupon the above referred to document was marked for identification as General Counsel's Exhibit 1-S.)

Mr. Kimmell: As General Counsel's Exhibit 1-T for identification, a document entitled Order on Respondent's Motion to Strike Certain Allegations of Complaint, Case No.

9-CA-418, dated November 6, 1951, and signed by Charles L. Ferguson, Trial Examiner.

(Thereupon the above referred to document was marked for identification as General Counsel's Exhibit 1-T.)

Mr. Kimmell: As General Counsel's Exhibit 1-U for identification, a document entitled Order on Respondent's Motion to Make Complaint More Definite and Certain, Case No. 9-CA-418, dated November 6, 1951 and signed by Charles L. Ferguson, Trial Examiner.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-U.)

Mr. Kimmell: As General Counsel's Exhibit 1-V for identification, a document entitled Statement, Case No. 9-CA-418, dated November 9, 1951 and signed by Jack G. Evans, Regional Director,

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-V.)

Mr. Kimmell: As General Counsel's Exhibit 1-W for

identification, a document entitled Affidavit of Service of Statement, Case No. 9-CA-418, showing date of mailing as November 9, 1951, whereon are attached Registered Return Receipts indicating service on parties named therein.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-W.)

Mr. Kimmell: As General Counsel's Exhibit 1-X for identification, a document entitled Motion to Reschedule

Hearing, Case No. 9-CA-418, dated November 13, 1951 and signed by John Skaggs, Jr. and Martin R. Glenn, attorneys for Respondent.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-X.)

Mr. Kimmell: As General Counsel's Exhibit 1-Y for identification, a document entitled Affidavit in Support of Motion to Reschedule Hearing, Case No. 9-CA-418, signed by John Skaggs, Jr. and Martin R. Glenn, dated November 13, 1951.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-Y.)

Mr. Kimmell: As General Counsel's Exhibit 1-Z for identification, a telegram dated November 23, 1951, addressed to the parties in this case, signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 1-Z.)

Mr. Kimmell: As General Counsel's Exhibit 2-A for

identification, a document entitled Order Rescheduling Hearing, Case No. 9-CA-418, dated November 23, 1951 and signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 2-A.)

Mr. Kimmell: As General Counsel's Exhibit 2-B for identification, a document entitled Affidavit of Service of Order Rescheduling Hearing, Case No. 9-CA-418, bearing date of mailing of November 23, 1951, to which are attached Registered Return Receipts indicating service upon the parties named therein.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 2-B.)

Mr. Kimmell: As General Counsel's Exhibit 2-C for identification, a telegram to the parties dated December 14, 1951, and signed by Jack G. Evans, Regional Director.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 2-C.)

Mr. Kimmell: And as General Counsel's Exhibit 2-D for identification, a document entitled Answer, Case No. 9-CA-418, dated November 19, 1951, signed by John Skaggs, Jr. and Martin R. Glenn, attorneys for Respondent.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 2-D.)

Mr. Kimmell: I offer General Counsel's Exhibits 1-A through 1-Z and 2-A through 2-D inclusive, into evidence.

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Trial Examiner Ferguson: No objections? They will be received in evidence.

(Thereupon the documents heretofore marked for identification as 1-A through 1-Z and 2-A through 2-D inclusive, were received in evidence.)

Proceedings

Mr. Glenn: The Company, without waiving its motion to dismiss and without admitting any jurisdictional duty on the part of the National Labor Relations Board, moves that the hearing in this case be continued, or adjourned, to a future

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date, and as reasons therefore, the Company states as follows:

By overruling the Company's Motion to Strike certain parts of the complaint, and also by overruling a major portion of the Company's motion to make the Complaint more definite and certain and then by overruling the Company's motion for production of certain documents, referred to in its motion for the production of certain documents, all of which orders were issued by the Trial Examiner—

Trial Examiner Ferguson: On what date, November 6th, wasn't it?

* * * * * * *

Mr. Kimmell: November 6th, sir.

* * * * * * *

Mr. Glenn: By the overruling of those motions, the Company has been unable, and also the Company's counsel has been unable to prepare this case for trial.

* * * * * * *

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Trial Examiner Ferguson: On the motion for a continuance, the motion for a continuance is overruled.

* * * * * * *

Mr. Glenn: I am asking that subpoenas be issued for Hon. Maurice Tobin, Secretary of Labor of the United States and Hon. Paul Herzog, Chairman of the National Labor Relations Board, and Hon. Jack G. Evans, Regional Director of the National Labor

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Relations Board, and that they be required to attend the hearing and testify as witnesses and produce all affidavits, material, statements and so-forth, if any, that have been filed by the Local Union No. 20, or the International Union, or the CIO, of the officers thereof, either with the Secretary of Labor under Sections 9F and G of the Act, or with the National Labor Relations Board under Section 9H of the Act.

Trial Examiner Ferguson: You may file it, and I will take it under advisement.

* * * * * * *

Mr. Kimmeh: I would like to offer as General Counsel's Exhibit 2E for identification, a document entitled Application for Subpoenas, Case No. 9-CA-418, dated December 17, 1951 and signed by Martin F. Schmidt, John Skaggs, Jr. and Martin R. Glenn, for Respondent.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 2-E.)

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Mr. Kimmell: With respect to the commerce facts in this case, I will read into the record the stipulated commerce facts from the transcript of Case No. 9-RC-1235, which is a representation hearing involving the instant company and the instant labor organization.

The Respondent in that case stipulated the following facts and has indicated in this hearing that it will likewise

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stipulate to these facts:

"The Coca Cola Bottling Company of Louisville, Kentucky, a Kentucky corporation, located in Louisville, Ken-

tucky, is engaged in the bottling and sale of soft drinks under contract with the Coca Cola Bottling Company (Thomas, Inc.) Chattanooga, Tennessee, incorporated under the laws of Tennessee. Annual purchases by the Company are in excess of $750,000, in excess of 75% of which are made in states other than the State of Kentucky. Annual sales are in excess of $750,000, of which approximately 20% represent sales to purchasers located in the State of Indiana."

I offer the foregoing stipulation.

Trial Examiner Ferguson: Very well, it will be received in evidence. You have no objection, I take it?

Mr. Glenn: No, the Company has no objection.

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Mr. Kimmell: With respect to the labor organization stipulation, it is my understand that the Respondent declines to stipulate the labor organization that filed the charge

is a labor organization within the meaning of the Act. I will therefore call Karl Saier as a witness to establish that fact.

KARL SAIER, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) Mr. Saier, state your name and address, please.

A. Karl Saier, 213-214 Coleman Building, Louisville, Kentucky.

Q. Where are you employed, Mr. Saier?

A. I am employed by Local Union No. 20 of the Inter-

national Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO.

Q. And what is your position with the Union?

A. My position is that of Secretary and Business Agent.

Q. Mr. Saier, in that position, are you familiar with the purposes of both the Local and International Union?

A. Yes, sir, I am.

Mr. Kimmell: I ask the reporter to mark for identification as General Counsel's Exhibit 3-A a document entitled Constitution, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 3-A.)

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Q. (By Mr. Kimmell) Mr. Saier, I hand you what has been marked for identification as General Counsel's Exhibit 3-A and ask you whether you are familiar with that document.

A. I am.

Q. And is that document, in fact, what it purports to be on the cover?

A. It is.

Mr. Kimmell: I offer General Counsel's Exhibit 3-A in evidence.

* * * * * * * * *

Trial Examiner Perguson: It will be received in evidence.

(Thereupon the document heretofore marked for identification as General Counsel's Exhibit 3-A was received in evidence.)

Q. (By Mr. Kimmell) Mr. Saier, I show you what has been identified as General Counsel's Exhibit 3-B—

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—and I will ask you whether you are familiar with this document.

A. I am.

Q. And is this document what it purports to be on the cover?

A. It is.

Mr. Kimmell: I offer General Counsel's Exhibit 3-B in evidence.

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Trial Examiner Ferguson: It will be received in evidence.

(Thereupon the document heretofore marked for identification as General Counsel's Exhibit 3-B was received in evidence.)

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Cross-examination

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Q. Now, Mr. Saier, does Local 20 admit Negroes to membership?

A. Local 20 has never denied membership to a Negro.

Q. Has it ever admitted a Negro?

A. There has never been an application made to Local 20 by a Negro.

Q. In other words, Local 20 has no Negroes as members at the present time, is that right?

A. Only those employed at the Coca-Cola—I would

like to qualify my remarks. When you directed your question at me I was thinking of Local 20 as pertaining to Brewery Workers. Now, we do have Negroes that have been admitted as members that are employees of Coca-Cola Bottling Company.

Q. You mean they have signed union authorization cards sometime ago, when you started your organizing campaign?

A. They have signed authorization cards and they have

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filled out applications to the union.

Q. Have they been initiated to the union?

A. They have been.

Q. Have they paid the initiation fee?

A. They have not.

Q. Have they gone through the ceremony of initiation? The ceremony of initiation into Local No. 20?

A. Yes.

. . . . . .

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Q. (By Mr. Glenn) When was the first time a Negro was first admitted to membership in Local 20?

A. To the best of my knowledge, it was this year.

Q. When this year?

A. I don't recall the exact date It was during our organizational drive at the Coca-Cola Company.

Q. Do you know how many employees of the Coca Cola Company are Negro employees?

A. Approximately 42.

Q. In other words, Local Union No. 20 never in its history, so far as you know, admitted any Negroes to membership until the organizing drive at Coca Cola, but that started in the Spring of this year, is that correct?

A. To the best of my knowledge, but I would like to qualify that. There have been Negroes that worked under a voluntary permit card which entitled them to membership in the union if they wanted it.

Trial Examiner Ferguson: You mean at other places, other places than this Respondent Company?

A. Here in Louisville, other places than the Coca Cola Company; that is true.

Q. (By Mr. Glenn) Now, your union represents employees at local breweries, does it not?

A. It does.

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Q. Falls Cities Brewing Company?

A. Yes.

Q. Fehrs Brewing Company?

A. Yes.

Q. Oertel's Brewing Company?

A. Yes.

Q. Are there any Negro members of the union who are employees of those companies?

A. There are none.

Q. There never have been any, have there?

A. To the best of my knowledge.

Q. Do you have a union shop agreement with these breweries?

A. We do.

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Q. (By Mr. Glenn) Now, Mr. Saier, you say now you have some Negro members of Local 20, is that correct?

A. That is correct.

Q. Since what date?

A. I don't know the exact date, but I think it is sometime in May, or perhaps the early part of June.

Trial Examiner Ferguson: What year?

A. Of 1951.

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Q. (By Mr. Glenn) Now, I believe you said they had not paid their initiation fees?

A. That is correct.

Q. Have they been paying monthly dues?

A. They have not.

Q. They have or have not?

A. They have not.

Q. Now, have they been attending union meetings?

A. They have.

Q. Have they attended union meetings with white employees?

A. They have.

Q. How many union meetings have they attended with white employees?

A. They were at liberty to attend as many as they chose.

Q. Were these white employees of Coca Cola Company or were they white employees of the brewing companies?

A. They were both, employees of the brewery and of the Coca Cola Company.

Trial Examiner Ferguson: The same local represents all of them?

A. The same local.

Trial Examiner Ferguson: The same local represents these breweries you named awhile ago? And the Coca Cola Company?

A. The Coca Cola and the breweries, yes, sir.

Q. (By Mr. Glenn) Will you check up your records between

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now and tomorrow and be prepared tomorrow to state the

date on which a colored person was first admitted into Local Union No. 20?

. . . . . .

A. I can.

Q. I believe you said awhile ago, however, that none of them have paid their initiation fees or have paid their dues.

A. I said none of the Negroes have.

Q. That is what I meant.

A. Yes.

Q. Give me the date tomorrow on which a Negro first attended

a union meeting after his initiation, after he was initiatd into the union.

Isn't it a matter of fact, Mr. Saier, that Local 20, over a long period of time, has maintained a policy of not admitting Negroes into the Union?

. . . . . .

A. By "policy," Mr. Glenn, do you mean that we have denied membership to a Negro?

Q. (By Mr. Glenn) You have not had any Negroes in the Union, have you?

A. That is correct.

Q. Hasn't the union maintained a policy over a long period of time, Local 20, that it didn't want Negroes in the Union?

A. I will repeat again, the Local has never denied membership to a Negro. The hiring procedure is such that we never had the opportunity to deny membership to a Negro.

. . . . . .

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Q. (By Mr. Glenn) Well, did a Negro ever make an application?

A. Not to my knowledge, or you might say not since I have held office.

. . . . . .

Q. So far as you know, not prior to that time, is that correct?

A. That's correct.

. . . . . .

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Mr. Glenn: Mr. Kimmell; are you willing to stipulate that the relationship between the International Union and the Local Union is as set out in Board's Exhibits 3-A and 3-B?

Mr. Kimmell: Yes, I will so stipulate. General Counsel so stipulates.

. . . . . .

Redirect Examination

Q. (By Mr. Kimmell) Mr. Saier, these various breweries which you have mentioned, in which you represent employees, can you state of your own knowledge, whether any of these breweries employ Negroes who would come within the jurisdiction

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of your union?

A. They do not. I would like to qualify that. I say they are not, as far as I know, employing any that come within our jurisdiction.

Q. Now, Mr. Saier, state whether or not it is a custom of your Union not to require the initiation fees or membership fees of employees until such time as a collective

bargaining agreement has been executed for the plant in which they are employed?

. . . . . .

A. That is the common practice.

Q. (By Mr. Kimmell) Is that a common practice of your Union?

A. Of the International Union.

Q. And of your Local?

A. And of the Local Whenever a new plant is organized, it is the custom to waive the fees until such time as the contract has been negotiated.

. . . . . .

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Q. (By Mr. Kimmell) Do you know what the policy of your International Union is with respect to the admittance of people of the Negro race?

. . . . . .

A. The position of our International Union is that there is to be no discrimination because of race, sex, creed or color.

Q. (By Mr. Kimmell) Now, do you know what the position of your Local is with respect to the same question?

A. The position of the Local is the same.

. . . . . .

Recross-examination

Q. (By Mr. Glenn) You state that the brewery or breweries

55

never employed any Negroes, is that correct?

A. I didn't say that.

Q. Do you know whether or not the breweries ever employed any Negroes?

A. They do.

Q. Do you know whether they have over a long period of time or not?

A. What do you mean by a "long period of time"?

Q. Well, you have been Secretary and Business Agent since 1945, I believe you stated, didn't you?

A. '49.

Q. '49, excuse me. Have they employed any Negroes during that period of time?

A. They have.

Q. In what capacity, do you know?

A. Janitors and chauffeurs.

* * * * * * * *

A. The colored people Mr. Glenn was referring to are not members of the Union. However, I would like to state for the record that they have never asked for membership in the Union.

Q. (By Mr. Glenn) Well, your Union is not restricted to

any particular class of employees? Any brewery or soft drink worker is eligible under the constitution and by-laws to become a member, isn't he?

A. Yes, sir.

* * * * * * * *

Q. (By Mr. Glenn) Has Local No. 20 solicited any Negro membership in the breweries during your administration in office or prior thereto as far as you know?

A. I have, myself.

Q. I asked if the Union had.

A. Well, I am speaking for the Union. We have.

Q. All right, you solicited them. When?

A. At various times.

Q. Well, when?

A. Last year and this year.

Q. Were they admitted to membership?

A. They did not apply for membership.

Q. You solicited them?

A. I did.

Q. They made no application, though?

A. That is correct.

Trial Examiner Ferguson: You mean they refused to sign up, is that it?

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A. That is about the gist of it, your Honor. They were invited to sign authorization cards and they failed to do so.

Q. (By Mr. Glenn) Were they brewery workers?

A. It is not clear whether they would be in the unit or not, and in order to make certain that we would represent them, I asked them to sign authorization cards.

Q. Now, you said it is a custom of the Local Union not to collect dues and initiation fees until a collective bargaining agreement had been signed with a company, is that correct?

A. Yes.

Q. So any of these Negro employees of Coca Cola Bottling Company which you say have joined up with the union, have not paid any dues, or initiation fees, is that correct?

A. That is correct.

Q. Now, under these exhibits which you filed here, 3-A and 3-B, doesn't that provide—don't they provide, that is the constitution provide, that a person is not a member of the Union and not entitled to the rights of a member of the Union until he has paid the initiation fees and unless he pays the periodic dues that are imposed by the Union?

Mr. Kimmell: Objection.

Trial Examiner Ferguson: Well, I suppose the answer to

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that is found in these documents. If you know what it is offhand, you can tell me. I suppose they speak for themselves, though, when a person becomes a member. I suppose the constitution and by-laws say that, don't they?

A. The general organizer of our International Union would have something to say in that respect, when it pertains to the organization of the plant, of what concessions are made to those employees with regards to initiation and dues.

Q. (By Mr. Glenn) No Negro employees of the Coca-Cola Company are presently paid-up members of your union, are they?

A. They haven't paid any dues. Like I stated before, the initiation fee is often waived in situations similar to this.

Q. Isn't it true in your Union, that people do not have the right to vote for officers and are not considered members in good standing unless all dues are paid up in full?

A. All members have the same rights. They can vote as long as they are members of the Union.

Q. (By Mr. Glenn) Now, you say the International Union has a policy of no racial discrimination.

A. Yes.

Q. What is the policy of Local 20?

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A. No discrimination.

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Trial Examiner Ferguson: Now, I want to ask a question. Was there a representation case involving these parties?

Mr. Kimmell: There was, sir, . . .

. . . . . .

Trial Examiner Ferguson: What happened in that representation case?

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Mr. Glenn: The Board ordered—by Board order, a bargaining unit was established.

. . . . . .

An election was directed. The election was held on December 12th.

. . . . . .

. . . by Board order, supervised by Board representatives, and a majority of the employees voted against the union.

Mr. Kimmell: The facts concerning that are in 96 NLRB, No. 209. The Board issued a decision and directed an election.

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Trial Examiner Ferguson: And what is the number of the

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case?

Mr. Kimmell: 9-RC-1235.

. . . . . .

I would like to also add in that respect, to the best of my knowledge, there has been received in the Regional Office of the Ninth Region, timely objections to the conduct of that election, filed by the labor organization; and also

to the best of my knowledge, no decision has been reached on those objections.

Trial Examiner Ferguson: Is that all stipulated?

Mr. Glenn: The Company has no notice or information of any objection having been filed.

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Redirect Examination

Q. (By Mr. Kimmell) Mr. Saier, did you have occasion to participate in an organizational drive conducted by your union at Respondent's plant during the month of April, 1951?

A. I did.

Q. . . . How did this organizational drive commence? What were the circumstances surrounding it?

A. Well, it has been the ambition of every union to organize the Coca-Cola Company for years. This first came about through telephone calls from some of the brewery drivers saying that they had been questioned by drivers employed by the Coca Cola Bottling Company in regards to joining our union. Through these calls I came in contact with Mr. Delmar Hoagland, who was employed as a driver at the Coca Cola Company, and I furnished him

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with authorization cards and told him to distribute them among the employees at the Coca Cola Company. After some time, we were able to call a meeting of the drivers of the Coca Cola Company.

Q. Mr. Saier, by what means did you call this meeting of the drivers?

A. Through Mr. Hoagland.

Q. Did you instruct Mr. Hoagland to inform the other employees that there was going to be a union meeting?

A. Yes, I did.

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Trial Examiner Ferguson: Well, I thought he said he called a meeting of the drivers. Is that all you were trying to organize, the drivers, or all employees, or who?

A. All employees.

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Q. (By Mr. Kimmell) Mr. Hoagland, do you know what his position with the Coca Cola Company was?

A. He was a driver-salesman, or route salesman; whatever you call him.

Q. Now, at this time you spoke to Mr. Hoagland relative to informing the remaining employees of the union meeting; did you tell him to inform all the employees of the plant or just certain classes of them?

A. I don't exactly recall that. I am sure I didn't exclude anyone, but it so happened at that time that the drivers were the ones who were interested in this thing.

Q. Now, this union meeting that we are talking about, what was the date you set for that meeting?

A. The first meeting was in the latter part of April.

Q. Was it about April 25th, 1951?

A. I believe that was the date.

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Q. (By Mr. Kimmell) Now, you say you gave Mr. Hoagland cards to distribute. Did he subsequently return those cards to you?

A. Yes, he returned a number of those cards to me, signed.

Q. Signed by employees?

A. By employees.

Q. Now, at this meeting of April 25th, state how many

employees attended this meeting.

A. There were 20 or more employees.

Q. And what occurred at this meeting, Mr. Saier?

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A. The functions of the union were explained to employees that attended the meeting and those who had not already signed were invited to do so.

Q. Now, did you have occasion at the end of this meeting to give Mr. Hoagland a number of additional union authorization cards?

A. I did.

Q. And did he take them away with him?

A. He did.

Q. Now, sometime after this first union meeting, did you have occasion, in company with another union representative, to distribute leaflets outside the Employer's plant?

A. Yes.

Q. How long after this first union meeting was this distribution of leaflets undertaken?

A. Just a few days, if I recall.

Q. Who were you in company with at this time? Who assisted you in distributing these leaflets?

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A. I think my assistant, Thomas Gray, helped me.

Q. He is not an employee of the Company?

A. No, no.

Q. Now, when you were distributing these leaflets, were you approached by any representative of management?

A. I was.

Q. Who was this person?

A. Well, the first representative that approached me was Mr. Schmidt, Mr. Martin F. Schmidt.

Mr. Kimmell: Mr. Glenn, I wonder if we may stipulate that Mr. Martin Schmidt is, I believe, the President of the Company?

Mr. Glenn: He is the Vice-President of the Company.

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Q. (By Mr. Kimmell) Now, what did Mr. Schmidt say to you, and what did you say to him?

A. Mr. Schmidt asked me for one of the leaflets that I was distributing, which I gave him, and we introduced ourselves to each other. He looked at the leaflet and said, "You make it sound pretty bad," or words to that effect. I told him, "I heard that's the way it was."

Q. Now, during that day did any of the other representatives of management have occasion to speak to you?

A. Yes.

Q. Who was that individual?

A. Mr. Miller, Mr. William Miller.

Mr. Kimmell: Mr. Glenn, may we stipulate that William Miller, referred to by the witness, is the sales-manager?

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Mr. Glenn: We will stipulate that Mr. William Miller is Sales-Manager.

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Mr. Kimmell: May we also stipulate that he has authority to hire and fire employees, and direct employees in their work?

Mr. Glenn: Yes, we will stipulate that.

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Trial Examiner Ferguson: Generally, or in his department?

Mr. Glenn: In the sales department.

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Q. (By Mr. Kimmell) Now, Mr. Saier, state as best you can recall, what Mr. Miller stated to you and what you stated to him on this occasion.

A. Mr. Miller evidently recognized me. He came out and asked me my name and I told him he was correct, and we had a conversation there.

Q. Did you ask him his name?

A. He introduced himself. In the course of our conversation, we talked about the union and about whether the employees should have a union or not. He made the remark that he had heard good things about our union and that if they had to have one, he thought that his employees should be represented by the Brewery Workers Union.

Q. Now, subsequent to this time, was there another union meeting held?

A. There was. The handbills announced another union meeting, the handbills I was distributing.

Q. What was the date?

A. I believe it was April 28th.

Q. What occurred at the 28th meeting?

A. At this meeting, there were employees from various departments of the Coca Cola Company, and again there were organizational speeches made to them. The workings of the union were explained, and what procedure would be followed in obtaining a collective bargaining agreement with the Company. They were again invited

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to sign cards, those that hadn't already, and more cards were distributed to some of them, including Mr. Thomas

Brooks, and Mr. Frank Kamenish, for obtaining the signatures of other employees of the Company.

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Q. (By Mr. Kimmell) Mr. Saier, at this meeting, were there both white and colored employees present?

A. There were.

Q. And can you state of your own knowledge, what jobs are generally assigned to the white employees of Respondent?

A. White employees have jobs all over the plant. I mean, they are employed in all departments.

Q. Well, the white employees who were at your meeting, were they not all driver-salesmen, primarily?

A. The majority were driver-salesmen.

Q. Now the colored employees, what tasks did they perform?

A. They worked in the production part of the plant.

Q. In other words, you had two separate groups of union adherents at this meeting?

A. I think there were more than two; there was also representatives of the advertising and cooler departments.

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Q. (By Mr. Kimmell) Mr. Saier, did you make any suggestions to the employees relative to the selection of spokesmen?

A. Well, it was explained to them that when the union had the unit formed, that they would have to elect their own shop stewards and also members of the contract committee. They were asked to do so.

Q. Now, the colored production employees, can you state who

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they selected as their spokesmen?

A. They designated Mr. Thomas Brooks.

Q. How was this done?

A. Well, it was by acclamation. They were asked to nominate their representatives and since there was only one and they were unanimously in favor of him, that was the end of it.

Trial Examiner Ferguson: You mean just the—what did you call them? Colored production employees?

A. They were part of the production department.

Trial Examiner Ferguson: What kind of work did they do mostly?

A. Well, they stacked cases and worked on the bottling machinery.

* * * * * * *

Mr. Kimmell: I ask the reporter to mark as General Counsel's Exhibit 4 for identification, a typewritten document of one page in the form of a letter dated May 7th, 1951, and addressed to the Coca Cola Bottling Company of Louisville, signed by Karl Saier.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 4.)

Q. (By Mr. Kimmell) I show you what has been marked for identification as General Counsel's Exhibit No. 4, Mr. Saier, and ask you whether this is a true copy of a letter which you wrote on that date?

A. It is.

Mr. Kimmell: I offer General Counsel's Exhibit 4 in evidence.

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Q (By Mr. Kimmell) I will hand you Exhibit No. 5, a typewritten document of one page dated May 10th, 1951,

addressed to Mr. Karl Saier, Secretary and Business Agent and signed by Martin L. Schmidt, Vice-President, and ask you if this is a letter that you received at a date subsequent to the time you mailed General Counsel's Exhibit 4.

A. It is.

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Trial Examiner Ferguson: Let the record show General Counsel's Exhibit 4 is received in evidence.

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(Thereupon the document heretofore marked for identification as General Counsel's Exhibit 4 was received in evidence.)

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Mr. Kimmell: I offer General Counsel's Exhibit 5.

Trial Examiner Ferguson: No objection? It will be received in evidence.

(Thereupon the document heretofore marked for identification as General Counsel's Exhibit 5 was received in evidence.)

Mr. Kimmell: I will have marked for identification as General Counsel's Exhibit 6, a document entitled Petition, Case No. 9-RC-1235.

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 6.)

Q. (By Mr. Kimmell) I show you this Petition and ask you whether this is a true copy of the Petition which you filed with the Board on the date set forth therein.

A. Yes, it is.

Trial Examiner Ferguson: What is the date of it?

Mr. Kimmell: It shows date of filing of May 14th, 1951.

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Mr. Kimmell: I take it GC-6 is received, then?

Trial Examiner Ferguson: Yes, it will be received.

(Thereupon the document heretofore marked for identification as General Counsel's Exhibit 6 was received in evidence.)

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Recross-examination

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Q. (By Mr. Glenn) Mr. Saier, when you were talking about the union meeting held on April 26th, I believe you said that Thomas Brooks was designated to head the organizational drive among the Negro employees of the Coca Cola Company, since there was only one there. Do you mean by that that Thomas Brooks was the only Negro there?

A. I didn't say that. There were both Negro and white employees at this meeting.

Q. How many people were present at the meeting?

A. I don't know exactly. I would say 40 or more.

Q. How many present were Negroes?

A. I don't remember that, either. It seems to me, looking back, that they were about half and half.

Q. Well, what did you mean by your statement awhile ago when you said—I took it down verbatim—"since there was only one there, Thomas Brooks was designated to head the Negro organizational drive"?

A. His name was the only one suggested. He was not the only one there. There was no other Negro designated at that meeting to head his group.

Q. This meeting that was held on April 28th, that was an organizational meeting, wasn't it?

A. That is correct.

Q. You had people there who had not become members of the Union; is that correct?

A. That is right.

Q. Did you have anybody there who had not signed union authorization cards?

A. Yes.

Q. None of these people were actually members of the union at that time, were they?

A. No.

Q. Now, you say that when you were passing out leaflets near the Company's property, Mr. Schmidt approached you and had a conversation with you. Were you on Company premises at that time?

A. I was not.

Q. He didn't attempt to stop you from passing out the leaflets, did he?

A. No.

Q. He didn't threaten you in any way, did he?

A. He did not.

Q. From what you said, you had a very pleasant conversation with him, is that correct?

A. It wasn't unpleasant.

Q. Now, the same thing is true of Mr. Miller, isn't it?

A. That is true.

. . . . . .

TRANSCRIPT OF EVIDENCE

December 18, 1951

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Trial Examiner Ferguson: On the record.

Pursuant to Respondent's application for subpoenas, duces tecum, directed specifically to Maurice Tobin, Secretary of Labor of the United States, Paul Herzog, Chairman of the National Labor Relations Board, and Jack G. Evans, Regional Director, Ninth Region, National Labor Relations Board, requesting as to each the production of certain documents therein described, the following subpoenas are issued:

No. B-15066, directed to Maurice Tobin, Secretary of Labor, United States;

No. B-15067, directed to Paul Herzog, Chairman of the National Labor Relations Board;

No. B-15068, directed to Jack G. Evans, Regional Director, Ninth Region, National Labor Relations Board.

Each of said subpoenas shall direct the appearance of the person named therein before Charles L. Ferguson, a trial examiner of the National Labor Relations Board, at the National Labor Relations Board hearing room, Second Floor of Federal Security Building, South, 4th and "C" Streets, Southwest, in the City of Washington, D. C., on the 7th day of January, 1952, at 10:00 o'clock a.m. of that day.

Respondents will insert, in conformity with their application, a description of the documents which they request the

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respective parties to produce.

The subpoenas are issued pursuant to Section 11 of the National Labor Relations Act, and Section 102.31 of the Rules and Regulations of the National Labor Relations Board.

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Testimony of Delmar Hoagland

DELMAR HOAGLAND, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) Mr. Hoagland, will you state your name and address, please?

A. Delmar Hoagland, 1145 South 18th Street, Louisville.

Mr. Glenn: What is the address?

A. 1145 South 18th Street.

Trial Examiner Ferguson: That's Louisville, Kentucky?

A. Yes, sir.

Q. (By Mr. Kimmell) Mr. Hoagland, have you ever been employed by the Coca Cola Company of Louisville?

A. Yes, sir, I have.

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Q. (By Mr. Kimmell) Now, when was the first time that you were employed by the Respondent Company?

A. I think it was in 1941.

Q. What job did you have at that time?

A. I was a helper, junior salesman.

Q. What was the nature of your duties?

A. I assisted the truck driver in deliveries.

Q. How long did you work at that time?

A. Approximately two and a half years.

Q. And did you then resign?

A. Yes, sir, I did.

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Q. (By Mr. Kimmell) What was your reason for resigning?

A. • • • I quit for a better job.

Q. I see. Now, did you then work with the Company again?

A. Yes, sir, I did.

Q. When was that?

A. I believe it was in 1943.

Q. How long did you work at that time?

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A. A very short time. I think it was a couple of months, about two months.

Q. What job did you hold at that time?

A. I had a route, route salesman at that time.

Q. You were a driver-salesman?

A. Yes, sir.

Q. And did you resign at that time?

A. Yes, sir, I did.

Q. And what was your reason for resigning at that time?

A. I was going to the Army.

Q. I see. Now, did you ever have occasion to again seek re-employment with the Company within the period of August or September, 1950?

A. Yes, I did, in August.

Q. And what were the circumstances surrounding that?

A. Well, I called at the plant that day to see Mr. Miller.

Q. Mr. William Miller?

A. Yes, sir.

Q. He is the Sales Manager?

A. Yes, sir; and he wasn't in. I saw Mr. Ferst, the Plant Superintendent.

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Mr. Glenn: Mr. Ferst occupies the position of manager in the production department and is not plant superin-

tendent. Mr. Ferst supervises the production department and has authority to hire and fire employees in that department.

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Mr. Kimmell: General Counsel stipulates to those things. I assume the Respondent will.

Mr. Glenn: Yes.

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Q. (By Mr. Kimmell) Now at this time you spoke to Mr. Ferst, what was the nature of the conversation with him?

A. Well, I asked if he knew whether Mr. Miller had anything open, in his department. He said he didn't know but he would see him and see if he had anything in the meantime.

Q. Did you subsequently receive a call from Mr. Miller?

A. Yes, sir, Mr. Miller called me, I think it was the next day or two, and asked me to come to the plant to see him.

Q. Did you thereupon go to the plant to see him?

A. I did.

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Q. (By Mr. Kimmell) Now, tell the Trial Examiner in your own words the conversation you had with Mr. Miller at the time you went to see him about re-employment with the Company.

A. Well, we were talking for a while, and he says that if I had stayed there when I was first employed there with the Company, I would have been with the Company ten years, that I would have had a Class A route at that time.

Q. Explain what a Class A route is.

A. Well, the routes run "A", "B", "C" and "D".

"D" is the lowest paying route that they have. "A" is the highest paying route.

Q. And "C" and "B" are inbetween?

A. Yes, sir.

Q. And a salesman advances from a Class D route to a Class A route if he is a good worker?

A. Yes, sir.

Q. And what else did you and Mr. Miller talk about?

A. Well, he said he would give me a job; he was glad to see me come back, but he would put me on as a telephone salesman, telephone-driver-salesman.

Q. Explain what a telephone-driver-salesman is.

A. It is a special delivery; you take routes out when a man is off or on vacation.

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Q. (By Mr. Kimmell) How was that paid?

A. It paid $39.00 a week.

Q. Was there any commission?

A. Only when you took a route out.

Q. You say when you took a route out. Was that in the nature of a substitution or an absent driver?

A. Yes, sir.

Q. How many drivers, to your own knowledge, does the Company employ?

A. I think it is about 58.

Q. How long did you work as a telephone salesman?

A. About a month I think it was.

Q. Then what occurred?

A. I got a promotion; I got a route in English, Indiana.

Q. And who assigned you to this route in Engl sh, Indiana?

A. Well, I believe Mr. Miller did. He didn't give it to me himself, but the sales—rather the supervisor of

that territory

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gave it to me.

Q. Who is that individual?

A. That's Mr. Hartmann.

Q. What is his first name, do you know?

A. Irwin, I believe it is.

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Mr. Kimmell: English, I take it, is a little town in Indiana.

Will the Respondent stipulate that the Irwin Hartmann referred to is a route manager, and in that capacity has the authority to direct employees under his supervision and to recommend their hire and fire?

Mr. Glenn: The Company will stipulate.

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Q. (By Mr. Kimmell) Now, on this English, Indiana route, what did it pay?

A. $39.00.

Q. Was that a Class D route?

A. Yes, sir.

Q. Did you also receive any other type of remuneration?

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A. I received a commission and a safe driving award every week.

Q. What was this commission paid on?

A. On sales of Coca Cola.

Q. So much per case?

A. So much per case, yes, sir.

Q. Now, this English, Indiana route, what kind of route was it?

A. Well, there was a lot of driving involved; it was a

Q. You say there was a lot of driving. Was that because it was in the country?

A. Yes, sir.

Q. Did that also mean that you worked rather long hours?

A. Yes, sir, it did.

Q. Now, how long did you work on the English route?

A. I was on it about four months, I believe.

Q. And then did you have occasion to transfer to another route?

A. Yes, sir, I did.

Q. Well, explain the circumstances surrounding that.

A. There was a route open in the West End here in the city, it was I think West End route No. 2, and there was a notice on the bulletin board that Mr. Miller would accept bids for that route.

Q. Explain what you mean by accept bids.

A. On the basis of how long you had been working there, and whether you thought you deserved the route, if you thought you deserved the route, you could bid on it.

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Trial Examiner Ferguson: That means just apply for the job, doesn't it?

A. Yes, sir.

Q. (By Mr. Kimmell) Now, did you receive this West End route?

A. No, I didn't. Before the route was given to anyone, Mr. Miller asked me if I would just as soon have the Jeffersonville route. There was another route open at that time. I told him I would, I would take any city route in preference to the route I had, if I could get it, and he said he would take care of me. So, I eventually got that haymarket route, it was a city route and it paid about the

same money as I was making on this country route.

Q. Did you prefer this haymarket route to the English route?

A. Yes, sir, I did.

Q. Why did you prefer it?

A. Mostly because it was less driving involved.

Trial Examiner Ferguson: It was in Louisville, is that

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right?

A. Yes, sir.

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Q. Then did you have occasion to bid on another route?

A. Yes, I did.

Q. What route was that?

A. That was Shephardsville and suburban.

Q. Why did you bid for that route?

A. Because it was a better route and paid more money.

Q. Was that a higher class route?

A. Yes, sir.

Q. What class was it?

A. Well, when I got it it was a "C" route.

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Q. (By Mr. Kimmell) Now, did you receive that route?

A. Yes, sir, I did.

Q. At the time you received it, did you have a conversation with Mr. Hartmann relative to other employees bidding on that

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route?

A. No, I had a conversation with Mr. Sheehan, sir.

Q. Who is Mr. Sheehan?

A. He is another supervisor, route manager.

Mr. Kimmell: Will the Respondent stipulate that the facts that were previously stipulated with respect to Mr.

Hartmann equally apply to Mr. Sheehan?

Mr. Skaggs: Yes.

Mr. Glenn: These men, however, have authority to make recommendations to hire and fire only as to route salesmen under them as the route manager.

Mr. Kimmell: I understand that, yes.

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Q. (By Mr. Kimmell) What did Mr. Sheehan tell you at this time?

A. He told me that he and Mr. Miller had been talking, and that he told Mr. Miller that he thought I would be the best man for that route out of the ones that had bid for it. I don't know how many that was.

Q. In other words, there were more than one person bidding for the Shephardsville and suburban route?

A. Yes, sir, there were.

Q. When you got this Shephardsville and suburban route, did Mr. Miller tell you anything about how long you would be on this

route?

A. Yes, sir, he said it would probably be temporary, because there was a man that had been in service was coming back.

Q. Did he tell you the name of this man?

A. Bobbie Olliges.

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Q. (By Mr. Kimmell) Did he tell you what would happen when this Mr. Olliges returned from the Navy?

A. He said he would get this route, but I would take my old route back.

Q. And you agreed to that?

A. Yes, sir, I did.

Q. Now, at some later point did Mr. Miller again talk

to you about this situation about this individual returning from the Navy?

A. Yes, sir, he did.

Q. About when was that?

A. That was about, I think, about a week before my employment was terminated.

Q. Now, what did Mr. Miller tell you at this time?

A. He said, I called in that day, we always call in before we come into the plant to see if there is anyone that we missed or anyone that needs Coca Cola—there wasn't anyone that called in—so Mr. McHugh, the checker, told me that Mr. Miller

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wanted to see me.

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A. (Cont'd) He said that Mr. Miller wanted to see me that day. I went in the plant and Mr. Miller was in there in Mr. McHugh's office at that time and he said that he had some bad and some good news for me; that Bobbie Olliges was coming back. I think he said it would be the following week. And he said he would then get my route and I would take my old one back, but that I would take this old route back at the same pay I was getting on the new route.

Q. (By Mr. Kimmell) Was that at a higher pay than the route normally paid?

A. Yes, sir, it is.

Q. In other words, you would get Class C pay for working on a Class D route?

A. Yes, sir.

Q. What else did he tell you?

A. He told me not to tell anyone about it, not to say anything about it.

Q. Did he say when this change-over was going to be

effective?

A. I think he said it would be Monday, a week.

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Q. (By Mr. Kimmell) The conversation you had with Mr. Miller, that was on the 21st of April, wasn't it?

A. I believe it was.

Q. And he said the change would be effective a week from the following Monday?

A. Yes, sir, that is right.

Q. Which, from my calendar would make it the 30th of April.

A. Yes, sir.

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Trial Examiner Ferguson: You mean 1961?

Mr. Kimmell: Yes, sir.

Q. (By Mr. Kimmell) Now, during this month of April, did you have occasion to ever discuss the union with a beer driver employed by one of the breweries in town?

A. Yes, sir, I did.

Q. Do you recall this individual's name?

A. Frank Pilato was his name.

Q. By which brewery was he employed?

A. Fehrs.

Q. What was the nature of your conversation with him?

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A. Well, we had been talking before about unions and five day work weeks and so on. We usually met at this restaurant at the same time and ate lunch together; and he told me that—I told him rather, that there was some of the men down there that would like to see a union at Coca Cola. So, he put me in touch with Mr. Saier.

Q. Now, when was this conversation with him? Was it

after you had talked with Mr. Miller about being transferred back to your old haymarket route?

A. No, sir, that was before.

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Q. (By Mr. Kimmell) Did you later contact Mr. Saier?

A. I did.

Q. By what means?

A. Well, I first talked to him on the phone.

Q. What was the conversation you had with him at that time?

A. Well, he told me that if the men at Coca Cola did want a union, he would do all he could to help, and they would have to come to him; he would have to know what they wanted first.

Q. Now, did you ever talk to him again?

A. Yes, sir. He, at a later date, gave me some cards to pass out among the employees to be signed. I took the cards and gave some of them to Mr. Brooks and Mr. Kamenish had some

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of them.

Q. Now, these cards—did these two employees return these cards to you signed?

A. Yes, sir, they returned the cards to me and I gave them to Mr. Saier.

Q. And you also returned the cards which you had gotten signed to Mr. Saier?

A. Yes, sir.

Q. Did you ever talk to Mr. Saier with relation to holding a union meeting?

A. Yes, sir, I did. We wanted to get together and find out what had been done and what could be done, and I think we held a meeting on Second Street, at a union hall. I believe it is Second and Kentucky.

Testimony of Delmar Hoagland

Q. Do you recall when that meeting was held?

A. I believe it was April 25th.

Q. Now how were the employees in the plant informed of this meeting?

A. There was no leaflets passed out, we just passed the word around that there would be a meeting that day.

Q. Did you pass the word around?

A. Yes, sir, I did.

Q. And did Tom Brooks?

A. Yes, sir, Tom Brooks, and so did Kamenish.

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Q. (By Mr. Kimmell) Now, did you pass the word around primarily among the drivers?

A. Yes, sir, I did.

Q. And Kamenish helped you, is that right?

A. Yes, sir.

Q. And Mr. Brooks passed it around mostly among the production employees?

A. Yes, sir, plant employees.

Q. You didn't have too much direct contact with the plant employees did you?

A. No, sir, I didn't.

Q. Now, did you attend this meeting held on April 25th?

A. Yes.

Q. What occurred there?

A. There was some of the men at the meeting that had not signed cards yet, and all of them who hadn't signed cards signed them there, I think, except one man. There was about 20 men there, and then we talked over what we were going to do.

Q. At any rate, you signed your card previously?

A. Yes, sir, that is right.

Q. Now, during this April 25th meeting, was there another

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meeting held by the Company?

A. Yes, sir, about 4:00 o'clock that afternoon.

Q. That afternoon. Was there any notice, advance notice given on this Company meeting?

A. No, sir, there was no notice.

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Q. (By Mr. Kimmell) Had the Company ever held meetings of the employees before?

A. Yes, sir.

Q. What were they in relation to?

A. Oh, sales meetings and meetings around Christmas time they had.

Q. Was there any general practice as to how much prior notification would be given on Company meetings?

A. Usually they gave two or three days' notice.

Q. And they posted the notice on the bulletin board?

A. Yes, sir.

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Q. Speaking of this April 25th meeting of the Company, was there a prior notice given?

A. There was no notice, no, sir.

Q. How were you informed of that?

A. We were standing at the time clock ready to punch out that day.

Trial Examiner Ferguson: You mean leaving?

A. Yes, sir, when one of the route supervisors came down and said that there was going to be a meeting, so nobody of us left at that time. We went on upstairs to

the auditorium to the meeting room.

Q. And that was the first notice you had of this meeting?

A. Yes, sir.

Q. What occurred at this meeting?

A. Mr. Schmidt spoke at the meeting about the union and the way the Company had treated us, told us we could join the union if we wanted to, but if we didn't want to we didn't have to, but before we did anything, to stop and think about it. Mr. Ferst was at the meeting, too. The meeting was about ready to close and he jumped up and shouted at Mr. Austin—he is a salesman for the Company—if he had any complaints to make; and Mr. Austin said he had plenty of them, but he didn't say anything to anyone about them because they would all think he was a damn fool in the plant when he did have any complaints to

make. So, Mr. Ferst asked me did I have any complaints and I told him no. Now, he also asked Mr. Mialback.

Q. Mialback is another employee?

A. Yes, sir, Mialback was employed there then.

Q. Is Mialback still employed by the Company?

A. No, sir.

Q. Did he resign?

A. He resigned.

Q. About when, do you know?

A. I think about a month after I left there.

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Q. (By Mr. Kimmell) Did you ever have occasion to have a personal conversation with Mr. Ferst after that?

A. Yes, sir, I did.

Q. When was this?

A. It was the day before I was fired.

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Q. You were fired on April 28th?

A. Yes, sir.

Q. I mean on the 27th you had a conversation with him.

A. Yes, sir, on the 27th I had a conversation with him.

Q. Where did this conversation take place?

A. I was going up the steps to the check-up room and Mr. Ferst was right in front of me. He waited for me, and he asked me what was all this he heard about me going around talking to these men in the plant about a union; and I told him I didn't know what he was talking about; and he said he knew very well what it was all about, and just forget about it, and "after all I have done for you". I saw him again the same day as I was leaving the plant. He was coming out the gate in his car, and he stopped and asked me where I was going. I told him I was just going up to the bus stop, and he asked me to get in, that he would ride me up.

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A. (Cont'd) When I got in the car, I says, "About this question you asked me about going around and talking to all these men, I asked them to come to a meeting, union meeting, or asked them about it." He says, "It's all right, just forget

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about it. We know all about it." That is all that was said. There was no more said at that time.

Q. (By Mr. Kimmell) Now, did Mr. Ferst drive you to some point.

A. Yes, sir, he left me off at 15th—rather 16th and Hill.

Q. When you got off at 16th and Hill, did you have a conversation with any other employees of the plant?

A. Yes, sir, I saw Mr. Thomas Brooks and his brother.

Q. Was this by prearrangement?

A. Yes, sir, we had the meeting prearranged.

Q. What did you talk about to Mr. Brooks?

A. He needed some more cards for his department, and I was to get him some, and I had a few at that time which I gave to him.

Trial Examiner Ferguson: Well, Mr. Ferst didn't see that, did he?

A. No, sir, he didn't; he drove away.

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Q. (By Mr. Kimmell) Now, on April 28th, which is the next day, you were discharged; is that correct?

A. Yes, sir.

Q. Now, tell the Trial Examiner in your own words just the details surrounding that.

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A. I came in that day after my route was finished, and I was told that Mr. Miller wanted to see me in his office. I went in and he says—

Trial Examiner Ferguson: This is after your days' work?

A. Yes, sir, after the days' work was over. He said, "Hoagland, we are terminating your employment," and I says, "What's the reason?" and he says, "There is no reason at all, it is just terminated, and let's just forget about it right there." I told him it wouldn't do any good to do that because of this union thing—this didn't start because I wanted it to, it was because the majority of the men wanted the union, and that wouldn't help him any and he says, "We won't talk about that, I don't care to discuss it." And he offered me an extra weeks' pay at that time. He told me that he thought employment would be hard to get because that was during Derby week.

Q. (By Mr. Kimmell) By "Derby week", what do you mean?

A. The Derby about that time, at Churchill Downs. He would like to help me a little over that time, but I couldn't see where it would help because it was during Derby week, and jobs were not hard to get, you can get jobs; I think they are more plentiful then than they are at any other time.

Q. Did you take the money?

A. No, sir, I didn't take the money.

Q. Now, did you ever talk to Mr. Miller again?

A. Yes, sir, I talked to him later. I think it was the next

day or two. I first saw Mr. Saier and asked him would it be all right to take that money, because I didn't know what I was getting in to. And he said, "Yes, he thought it would be all right, he didn't see what it would hurt." So, Mr. Miller told me that I could come on out and get it. I went out and got it and he told me, I believe at that time, that he was talking about employment there, that during the Winter months, he could lay men off if he wanted to. He said he didn't have to keep them there like they do now, all year around. Of course, I didn't have anything to do with him on that.

Q. Mr. Hoagland, what was your usual time of reporting back to the plant after the days' work?

A. Whenever your route is finished.

Q. On the last route you had before you were fired, what was the usual finishing time?

A. Well, anywhere from—it might be 4:00 or 5:00 or you might get finished at 12:00 or 1:00.

Q. How about on Saturday?

A. Well, Saturday was the lightest day we had. Most

of the routes were like that, they would finish at 11:30 or 12:00 o'clock sometimes.

Q. Now, how about holidays such as July 4th or Labor Day?

A. July 4th, usually we finished early because we stopped—we stocked up all the dealers the day before.

Q. Was that a general custom? That is, for the drivers to

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stock the dealers the day before a holiday?

A. Yes, sir, it was.

Q. Now Derby day, is that any kind of a holiday in Louisville?

A. Yes, sir, it is; most of the trucks are supposed to be off the streets in downtown Louisville, I think, by 9:00 o'clock. Most of the city routes try to get done early that day because of the Derby, and the traffic is heavy that day.

Q. In other words, if a holiday fell on a Saturday, would you get in even earlier?

A. Yes, sir, you would.

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Cross-examination

Q. (By Mr. Skaggs) How old are you Mr. Hoagland?

A. 29.

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Q. Did anyone at the Coca Cola plant ever criticize you for any of your work while you were there this last hitch?

A. No, sir, they never did.

Q. No occasion?

A. On no occasion.

Q. Now, Mr. Hoagland, can you tell me what date you

first contacted Mr. Saier?

A. No, sir, I can't, I don't recall the date.

Q. Can you tell me about what date?

A. It may have been around April 10th or the 12th, I am not sure.

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Q. And where did you see Mr. Saier when you first saw him?

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A. I think I first saw him at his office.

Q. And that was when you referred to about the 10th of April?

A. No, I didn't see Mr. Saier then. I didn't see Mr. Saier until, it might have been a week or so later.

Q. About the 15th of April, perhaps?

A. Yes, sir, maybe.

Q. Was that the occasion when he first gave you the union cards?

A. Yes, sir.

Q. So you were engaged, shall we say, in the distribution of union cards to various of your fellow employees, beginning about April 15th?

A. That is right.

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Q. (By Mr. Skaggs) Where did you hand out the cards, Mr. Hoagland?

A. Outside the plant.

Q. You never handed one out inside the plant?

A. Not that I recall I didn't.

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Q. But you did pass the word of mouth around to various employees on the Company premises about the

time of the meeting, did you not?

A. I believe I did to one man.

Q. Well, where did you see the other people, if you didn't see them on the Company premises?

A. Well, coming to work I rode the bus with some of them. I met some of them outside after we got off from work.

Q. And when Mr. Ferst gave you your lift up to 16th and Hill Street, he didn't tell you not to join the union, did he?

A. No, sir, he didn't.

Q. All he said was, "We know what you are doing," is that correct? "We know all about it"?

A. He said, "We know all about it."

Q. Did you consider that he said that in a threatening tone of voice?

A. Yes, sir, I believe he did.

Q. How did he say it?

A. Well, he says, "Let's just don't talk about it, because we know all about it."

Q. In other words, he just indicated to you that he didn't want to discuss it with you, is that correct?

A. Yes, sir.

Q. That's the same thing Mr. Miller said to you, was it not?

A. Yes, sir.

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Q. Did Mr. Miller make any threats to you?

A. No, sir, he didn't threaten me.

Q. Did he attempt to coerce you in any way to stop any activity that you were engaged in?

A. No, sir.

Q. Mr. Hoagland, did you run a book, or the numbers

racket, while you worked at the Coca Cola Bottling Plant?

. . . . . .

A. No, sir.

Q. You are a professional gambler, aren't you, Mr. Hoagland?

A. No, sir.

Mr. Kimmell: Objection.

Trial Examiner Ferguson: Overruled.

Mr. Kimmell: Mr. Trial Examiner,—

Trial Examiner Ferguson: I will hear you.

Mr. Kimmell: If by these questions he is attempting to impeach the witness, as I understand my Rules of Evidence, you can only impeach a witness with a conviction for a felony.

Trial Examiner Ferguson: I do think, in fairness to the witness, and to me, that I should ask you at this point, if this line of questioning is in any way connected with the reasons which are claimed for the discharge of this witness. Otherwise,

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I am going to strike it.

Mr. Skaggs: All right, sir.

Q. (By Mr. Skaggs) Mr. Hoagland—

Trial Examiner Ferguson: Well, will you please advise me.

Mr. Skaggs: I want to ask this question, Judge.

Trial Examiner Ferguson: Would you please advise me? I think it would clarify things and assist me in ruling on the testimony if you would advise me what are you—why you discharged this man.

Mr. Skaggs: We discharged him because his work was unsatisfactory.

Trial Examiner Ferguson: If that's the reason, I will

strike the—

Mr. Skaggs: And because his conduct was unsatisfactory.

Trial Examiner Ferguson: Well, do you claim to have information that he conducted a book at the plant, and that was one of the considerations that entered into your discharge of the man? Otherwise, I will strike his testimony.

Mr. Skaggs: We claim that we suspected him of gambling activities among employees in the plant.

Trial Examiner Ferguson: That was one of the considerations that motivated your discharge of this man?

Mr. Skaggs: Yes.

Trial Examiner Ferguson: Very well.

Q. (By Mr. Skaggs) Now, Mr. Hoagland, I would like to ask

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you if at a date immediately subsequent, or immediately preceding December 11th, 1951, and pursuant to the requirements of the recent Federal legislation, if you did not procure a $50.00 betting stamp for the premises at 1145 South 18th Street where you reside?

Mr. Kimmell: Objection. The event referred to is after the discharge.

Mr. Skaggs: Well, there is no requirement to that before, no requirement to buy a betting stamp until after he was discharged, because that law became effective as of November 1, 1951.

Mr. Kimmell: No, but by that same token, it does not in any way go for any reason why he may have been discharged, for any event preceding such time.

Trial Examiner Ferguson: Yes, it will be sustained.

Mr. Skaggs: I will make an avowal for the record and an offer of proof. Counsel states, and it is true, that if the witness were permitted to answer, that he would state that

after November 1, 1951, that he procured a $50.00 stamp authorizing him to engage in gambling, said stamp being procured from the Collector of Internal Revenue at Louisville, Kentucky, under the name of Dale Hoagland, at an address, 1145 South 15th—18th Street.

Trial Examiner Ferguson: The offer is refused at this time. I may revise my ruling on it after I hear what you have

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to show, if anything, about the alleged gambling activities at the plant. At this time, it will be refused.

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Q. (By Mr. Skaggs) Mr. Hoagland, I believe you said that you had a conversation with Mr. Miller about a week preceding the termination of your employment. Saturday was April 21st, and Monday was April 23rd. Would you say that conversation occurred on Saturday, April 21st, when he told you Mr. Olliges was returning and you were going back to your old route?

A. I am not sure what date that was.

Q. You don't remember what day in the week it was?

A. No, sir, I don't.

Q. But you say it was in Mr. McHugh's office?

A. It was in Mr. McHugh's office.

Q. Was Mr. McHugh there?

A. Yes, sir, Mr. McHugh was there.

Q. He heard the conversation?

A. Yes, sir.

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Q. Mr. Hoagland, during the periods of time that you worked for the Coca Cola Bottling Company, you had become rather familiar with the working rules and regulations of the Company, had you not?

A. Yes, sir.

Q. You had been furnished and read one of their hand books?

A. Yes, sir.

Q. Every time that you had come back to work, is that correct?

A. Yes, sir.

Q. And you knew, did you not, that you, as all other persons employed in the same department, that your employment during the first year was a probationary period?

A. No, sir, I didn't know that.

Q. Mr. Miller did not explain that to you at the time you were employed?

A. No, sir.

Q. Don't you know that is the case at the Coca Cola Bottling Company?

A. No, sir, I don't know it.

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THOMAS BROOKS, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) Your name and address, please?

A. Thomas Edward Brooks, 1104 Cedar Court.

Q. Is that in Louisville?

A. Louisville.

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Q. Now, when did you first start working for the Company?

A. In October of 1942.

Q. Have you been in their employ since that time?

A. Yes, sir.

* * * * * * *

Q. And you were discharged when; when was that?

A. May, of 1951.

Q. And did you work there steadily until May of 1951?

A. Yes, sir.

Q. Now, when you first started working there, what was your job?

A. I was a laborer, just helping around.

Q. Were you at any time after that given a job on a machine?

A. Yes, sir, on the machine that washed the bottles.

Q. What do you call that machine?

A. Soaker.

Q. What was the nature of your work?

A. I put the bottles into the machine, they went through the solution, to come out and be rebottled.

Q. You would take the dirty bottles as they came into the plant and put them in the machine?

A. That is right.

Q. And that is one of the first steps in the operation?

A. That is right.

Q. How many men worked on this soaking machine?

A. Two of them.

Q. And is one more or less in charge and the other a helper?

A. More or less.

Q. In 1942, were you put on as a helper?

A. As a helper, yes.

Q. How long did you work as a helper, until you were put in charge of the machine?

A. Several months.

Q. And then you were put in charge of the machine?

A. That is right.

Q. Did you remain in charge of the machine until you were discharged?

A. That is right.

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Q. (By Mr. Kimmell) Now, this job working on the soaking machine, did it require you to be constantly present?

A. More or less. I couldn't leave it except for about three

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to five minutes or something like that.

Q. Why was that?

A. Well, the machine continuously run, and you had to keep the bottles in there or the machine would come up short and then they would stop.

Q. You say it required both men to be there?

A. Yes, sir.

Q. Except for short breaks?

A. Short periods.

Q. One man could carry on for a few minutes?

A. For a few minutes.

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Q. In other words, for the last month of your employment you had as your helper, William Trice?

A. That is right.

Q. And he had a month's experience on the machine?

A. Yes, sir.

Q. Had he ever worked on the machine before?

A. He had worked on others off and on.

Q. Now, what is the usual working hours at the plant?

A. Well, the usual working hours is from 8:00 until 5:00 o'clock.

Q. * * * Who is your—who directed you in your work?

A. Well, they have a fellow by the name of Clarence Sargeant in the basement; he is supposed to be over the basement work.

Q. The soaking machine was in the basement?

A. That is right.

Mr. Kimmell: Will Respondent stipulate that Clarence Sargeant, who is the basement foreman, has authority to direct employees in their work, and also to recommend the hire and fire of employees under his supervision?

Mr. Skaggs: Yes.

* * * * * * * *

Q. (By Mr. Kimmell) Now, in January or February of 1951, did you ever have occasion to talk to Mr. Ferst about a transfer?

A. Yes, sir.

Q. Now, what was that about?

A. Well, I asked him if he would let me go upstairs and work, because you could make more overtime upstairs than you could downstairs.

Q. What sort of work was done upstairs?

A. They stacked the cases and loaded the trucks.

Q. And do they make more overtime work?

A. Yes, sir, than they do downstairs, as a rule.

Q. And you were in need of more money?

A. That is right.

Q. What did Mr. Ferst tell you?

A. He told me, he said, "Well, I can't let you go up there because I don't have but a few good soaking men down

here, and I want to keep you down here."

Q. Do you have a brother named Lavell Brooks?

A. Yes, sir.

Q. Was he employed in the plant?

A. Yes, sir.

Q. Where was your brother employed?

A. He was what you call a field man. He worked all around the place. But everyday, he had a half an hour's work that he did extra, servicing the machines for the next day.

Q. That is overtime work?

A. Overtime work.

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Q. Now, did your brother Lavell Brooks have occasion to resign his employment?

. . . . . .

A. No. Wait a minute now. He quit—about two weeks after I got fired, that is the way that was. About two weeks after I got fired, I think is when he quit. But, you see, the overtime—he quit doing this overtime work around March.

Q. Why was that?

A. He had to go to G. I. school.

Q. At the time he quit doing this overtime work did you have, or rather did you and he have occasion to talk to Mr. Ferst about it?

A. Yes.

Q. What took place at this conversation?

A. We asked him if I couldn't have the extra half hour he had been getting since he was going to school.

. . . . . .

Q. What did Mr. Ferst say?

A. He said yes.

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Q. I take it you would do this extra work after your regular work on the soaking machine?

A. That is right.

Q. This was in March?

A. That is right.

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Mr. Kimmell: 1951.

Trial Examiner Ferguson: Is that right?

A. Yes, sir.

Q. (By Mr. Kimmell) Now, after this conversation with Mr. Ferst, did you then do this extra, overtime work on the machines?

A. Yes, sir.

Q. Did you do that steadily or until your discharge?

A. Until I was fired.

Q. Now, did you do this extra, overtime work on all days?

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A. That is right.

Q. It was one of the last operations?

A. That is right.

Q. Now, do you recall sometimes in April of 1951, an occasion where you and your brother, Carney Brooks, met Delmar Hoagland at a bus stop?

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A. Yes, sir.

Q. About when was that?

A. That was around the latter part of April.

Q. Now, was this by prearrangement?

A. Yes, sir.

Q. You had made an appointment with Mr. Hoagland to see him there?

A. I had made an appointment with him through another boy that knew him.

Q. Did you see Mr. Hoagland come up to the bus stop?

A. Yes, sir.

Q. How did he come up to the bus stop?

A. He was in Mr. Ferst's car.

Q. Did you see Mr. Ferst in the car?

A. Yes, sir, I saw him let him out.

Q. Did you then talk to Mr. Hoagland?

A. Yes, sir, I did.

Q. What were you talking about?

A. Well, we were talking about the benefits of the union and the organizing of the plant employees.

Q. Did you tell Mr. Hoagland anything about what you would do?

A. I did.

Q. What did you say?

A. I told him I would do the best I could to make them under-

stand that it would be a lot of advantage to us in the plant to have a union.

Q. Now, were you to talk mostly to the production employees?

A. That is right.

Q. Now, did you ever receive cards from Mr. Hoagland?

A. Yes, sir.

Q. What did you do with these cards?

A. I passed them around to different fellows to sign.

Q. In your department?

A. Yes, sir.

Q. And did these employees sign these cards and return them to you?

A. Yes, sir.

Q. What did you do with the cards?

A. I returned them to Mr. Hoagland and some I returned to Mr. Saier.

Q. Mr. Saier?

A. Yes, sir.

Q. About how many cards did you get signed?

A. I guess around 40, I imagine.

Q. And about how many employees are there in the production department?

A. Well, in the basement there is, I guess it is around 45 in the basement.

Q. Now, did you ever talk to Mr. Hoagland about a union meeting?

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A. Yes, sir.

Q. And what was the nature of that conversation?

A. Well, he told me when the next one would be, and he would let me know how to get there, and what-not.

Q. Now, did you tell any of your fellow production employees about that meeting?

A. Yes, sir.

Q. What did you tell them?

A. Well, I told them where the meeting would be and how to get there.

Q. In other words, you passed the word around about the meeting?

A. That is right.

Q. When was this meeting held?

A. I think this meeting was around the last part of April.

Q. What took place at this meeting?

A. Well, we had discussions about the union, and what benefits it would be to us and everything like that.

Q. Now, do you recall at this meeting whether Mr.

Saier said anything about the people appointing a spokesman?

A. He suggested that he thought we probably would have to have a spokesman for each group.

Q. Now, was anything done about that?

A. He asked who they would rather have as their spokesman, and several of the boys said they would rather have me.

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Q. That was among the production men?

A. Among the colored boys. So that way, they selected me as spokesman.

Trial Examiner Ferguson: Were all those basement employees colored boys?

A. The ones that were there that night.

Trial Examiner Ferguson: I mean the ones in the plant that worked in the basement.

A. No, sir, some worked on the floor above.

Mr. Kimmell: I think what the Trial Examiner wants to know is, are all the employees who work in the basement colored.

A. Oh, yes, sir.

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Q. (By Mr. Kimmell) Now, sometime after you spoke to Hoagland, did you ever have occasion to talk to Mr. Ferst?

A. Yes, sir, I did.

Q. What was that about?

A. Well, I talked to him several times. The first time I went into his office to borrow $2.00 from him, and he asked me, he told me, rather, that he had something he wanted to ask me.

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He said he wanted me to tell the truth, because he trusted

me, so I asked him what it was, and he asked me if I had heard anything about a union, and I told him no. So, he said, "Well, in case you do, let me know." So he gave me the money and I came on out.

Q. Did you ever talk to him again?

A. Yes, sir.

Q. How long after the first conversation was the second?

A. Well, it wasn't very long, but I don't know exactly when it was.

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Q. How long before your discharge was the second conversation?

A. It wasn't but a few days before that.

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A. Mr. Ferst. He said, "I want to see you after while up in Bud's office," and so I never said anything. He said, "I know you are mixed up in this business down here."

Q. What you are talking about now took place in Bud's office?

A. It took place in the basement.

Q. I see.

A. And so I never said anything. So he said, "I don't think I am going to want you up here in the evening any more."

Q. He was talking about your overtime?

A. The overtime. Then he said, "I don't think I am going to want you around any more at all." So, I still never said anything because I didn't want to bring on getting fired, you know. So, I said, "Okay." So later on he came back and patted me on the back and said, "Forget about what I said to you." Then, still later that day, he sent Mr.

Sargeant down to tell me to come upstairs that afternoon.

Q. Mr. who?

A. Clarence Sargeant. That I could go on back to the overtime job.

Q. Now, you were discharged on May 12th, weren't you?

A. I think so.

Q. Now, tell the Trial Examiner what happened, how that came about.

A. Well, I was in the locker room; I went in there to get some money to get some Coke out of the machine.

Q. Did you have to pay for Cokes in the plant?

A. Yes, sir.

Q. And—

A. He came in, there were several boys in there. They all ran out, which usually happened when he came in. So, he walked over to the urinal, stood there awhile and he came back, and so he said to me, he said, "Before you leave, I want you to come up in my office, I want to see you." I said, "Okay."

Q. Did you go up to see him before you left?

A. Yes, sir.

Q. All right, what took place then?

A. He told me, he said, "I have to tell you something, that I hate to tell you." I said, "What is it"? He said, "Well, I am going to ask you to quite your job, to resign."

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A. * * * "I want you to resign." I said, "Well, I can't do that. I need my job. I don't have any other one to go to, and my wife and kids are out of town at the time," she had a death in her family. He said, "Well, they keep riding me about you boys, they want me to get rid of all of you."

Q. By "all of you", what did he mean?

A. Evidently he meant the colored boys.

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Trial Examiner Ferguson: Well, what did you understand him to mean?

A. He said, "all of you boys down there," so I expected it to be colored boys.

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A. So I said, "Well, I can't quit my job." So he said, "Well, I will have to ask you to do it." He said, "They keep on riding me." He said, "You can't imagine the names I have been called and the things that have been said about me trying to keep you boys here." So, I sat there and we looked at each other for awhile and he would keep saying the same thing over again, so I said, "Well, at that rate, I guess I may as well go on home."

Q. (By Mr. Kimmell) Did you ask Ferst whether there was anything wrong with your work?

A. I asked him, I said, "Is there anything wrong with my work?" Have I been off from work too much or anything like that?". He said, "No; I haven't had any complaints about you," and he said, "If you go any place and look for a job, I will recommend you."

Trial Examiner Ferguson: Well, did you ask him why—.

A. Yes, sir, I asked him why was it, you know, that he was firing me. He said, "Nothing", he said, "I just have to let you go. They keep pushing me and I have to get rid of you." He said, "I may have to get rid of a whole lot of them."

Trial Examiner Ferguson: In time, was anybody else fired down there in the basement but you?

A. At that time, I don't know. I didn't have much

time to contact the rest of the boys after that.

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Examination

Q. (By Trial Examiner Ferguson) You got some cards, you say you got some cards from Mr. Hoagland?

A. Yes, sir.

Q. Did you also get some from Mr. Safer?

A. Yes, sir.

Q. And did you distribute these cards?

A. Yes, sir.

Q. They were union cards?

A. Yes, sir

Q. Where did you distribute them, in the basement, or somewhere else?

A. Well, some of those boys came to my house and got them and then, sometimes if I met them on the street, I would give them to them, because I was afraid to give them to them inside the plant there.

Q. And you get how many of them back, you say, signed?

A. Well, actually I don't know how many.

Q. You made a statement awhile ago.

A. Well, I got about 40 people to sign the actual cards.

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Q. Were they all workers in the basement?

A. Yes, sir. Some of the boys would come to my house and ask me for the cards.

Q. I say, did they all work in the basement?

A. Yes, sir.

Q. They were all colored fellows?

A. Yes, sir.

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Testimony of Thomas Brooks

Cross-examination

Q. (By Mr. Glenn) You had worked some overtime, hadn't you?

A. Yes, sir.

Q. Had you ever refused to work any overtime?

A. Yes, sir.

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Q. I will ask you if it is a matter of fact you hadn't frequently refused to work overtime since the first of the year, of January, 1951?

A. If there were times when something was wrong at home or I was sick or something like that, didn't feel like it, I didn't work.

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Q. (By Mr. Glenn) Did you frequently go into the locker room before quitting time, before the time the Company allowed for people to go in and change clothes?

A. Not frequently. Occasionally, I did, before 5:00 o'clock, that is.

Q. What was the time that the employees were supposed to go into the locker room to change clothes?

A. 5:00 o'clock.

Q. What time did you go into the locker room?

A. Sometimes I would go in around from ten to fifteen minutes before.

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Q. Didn't Mr. Ferst, and also Mr. Sargeant, on several occasions, tell you that you were going into the locker room too early?

A. Yes, sir.

Q. And didn't they ask you not to go into the locker room so early?

A. Yes, sir.

Q. And did you continue to go into the locker room?

A. No, I did not.

Q. (Cont'd) Go in early?

A. I stopped.

Q. Now, do they have any no smoking rules out at the plant?

A. Yes, sir.

Q. Is that rule applied down in the basement?

A. Yes, sir.

Q. Where you worked?

A. Yes, sir.

Q. Did you ever violate that rule by smoking in the basement? In the basement and in the locker room?

A. Yes, sir, I was in the locker room; I thought we could smoke in the locker room at this particular time, and I happened to come out and run into Mr. Schmidt, and he told me that we wasn't supposed to smoke in or out of the locker room, so I put my cigarette out.

Trial Examiner Ferguson: Was that one time?

A. One time, that time, yes, sir.

Q. (By Mr. Glenn) Now, the day that your employment was terminated, when Mr. Ferst walked into the locker room there—

A. Yes, sir.

Q. (Cont'd)—weren't you smoking at that time?

A. No, sir. I put a cigarette in my mouth and he said, "Watch those cigaretts", and I put it back in my locker.

Q. You are sure you weren't smoking then?

A. Yes, sir.

Q. Previously he had come in there and found you smoking?

A. He might have. He would always say when he came in, "Watch those cigarettes," like that.

Q. Did Mr. Sargeant ever catch you smoking?

A. No, sir.

Q. In the locker room or any place else?

A. No, sir.

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Q. (By Mr. Glenn) Had not Mr. Ferst and Mr. Sargeant previously warned you about violating Company rules?

A. No, sir.

Q. Had they ever told you that you left your machine too

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frequently?

A. I don't remember them ever telling me that.

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Q. Had they ever told you that when you left your machine you stayed away too long?

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A. No, sir.

Q. Hadn't they frequently warned you about violating a no smoking rule?

A. No, sir.

Q. You are sure about that?

A. Yes, sir.

Q. You said you got some union authorization cards signed. Were they signed on the Company premises?

A. I don't know where they were signed at.

Q. Where did you hand them out?

A. I handed them out to and from work on the bus or at home. Some of them came to my house for the cards,

or in the street; any place I met one of them, if I happened to have any cards.

Q. Did you hand any out in the plant?

A. I don't remember doing anything like that.

Q. Did anybody ask you for a union card while you were working

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in the Company plant?

A. Yes, sir.

Q. When they did, did you hand them out?

A. I didn't have them; I never kept them on my person.

Q. Did you keep them in the locker room?

A. I might have had some in the locker room at times.

Q. Well, maybe—just answer my question, did you hand any out if somebody asked you for them on the Company premises?

A. I don't think anybody got any in the plant, because I was always busy at the machine, when anybody would ask for it, and a lot of times I wouldn't have any at all; I would have to get them first.

Q. You were warned by the union not to hand them out on Company premises or on Company time?

A. I don't know who warned me, but somebody told me not to do it.

Q. And you didn't do it?

A. I didn't.

Q. Now, you didn't pass any of them out in front of Mr. Ferst, then, or Mr. Miller, or Mr. Schmidt?

A. I don't think so.

Q. They didn't see you pass any out?

A. Not that I know of.

Q. Did any of them tell you not to pass any out?

A. No, sir.

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Q. Did anyone in the Company ever tell you not to pass out any union authorization cards on Company premises? Or on the Company time?

A. No, sir.

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Q. You said you attended a union meeting. What was the date of that union meeting?

A. The first one I attended, I think it was in the latter part of April. I don't know the date. * * *

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Q. When you attended that meeting, had you signed a union authorization card?

A. I had.

Q. Had you paid up your dues into the union?

A. No, sir.

Q. Had you paid your initiation fees?

A. No, sir.

Q. Had you been initiated?

A. I imagine I was.

Q. Had you held up your hand and taken an oath?

A. Taken an oath, yes, sir.

Q. Go through any ceremony?

A. Yes, sir.

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Q. Have you ever paid your dues and initiation fees?

A. No, sir.

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Q. As a matter of fact, for several weeks before your employment was terminated, hadn't Mr. Ferst and Mr.

Sargeant both from time to time talked to you at various times and told you that you were violating Company rules?

A. No, sir.

Q. And that you were going to have to get on the ball?

A. No, sir.

Q. And that you were going in the locker room too early in

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the afternoon?

A. No, sir.

Q. And that as a result of these acts, other employees wanted to go into the locker room early?

A. No, sir.

Q. Isn't it a fact that on frequent occasions you had already gone into the locker room, changed clothes, cleaned up, and were ready to go slightly before 5:00 o'clock?

A. That was impossible. I was working until 7:00, 7:30, at that time.

Q. Well, now, you didn't work overtime all the time when they—

A. Not the whole time, I worked at the plant, but the time I worked from March, in my brother's place, making extra time, up until the time I was fired.

Q. A short time before your employment was terminated, hadn't you complained about not receiving overtime work?

A. Yes. I had asked for overtime work before I got this job, before I got this job.

Q. And when the Company then offered you overtime work, didn't you refuse it?

A. Not then.

Q. Then?

A. I refused overtime work at times when I would have sickness at home, or my wife was out of town, or

something like that. If

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my wife was sick; I would have to go home and take care of the kids as soon as I could, or if I was sick or something like that. I have arthritis, and have it pretty bad, and a lot of times I don't feel like working, the time that I have to work, and a lot of times I couldn't possible make overtime.

Q. Did you refuse to talk with Mr. Sargeant, the basement foreman; on occasions?

A. Never.

Q. Did you become surly with Mr. Sargeant and refuse to talk with him?

A. Do what?

Q. Did you become surly with Mr. Sargeant and refuse to talk with him?

A. I don't remember any time I didn't listen to whatever he had to say, regardless of what it was.

Q. You didn't listen?

A. I don't remember any time that I didn't listen to it.

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Redirect Examination

Q. (By Mr. Kimmell) Mr. Brooks, these times that you were asked to work overtime when you refused, because of illness or having to take care of the children and so forth, when were these times?

A. That was a long time before this happened.

Q. How long ago?

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A. I imagine it would have been over a year.

Q. But in March you got this regular overtime work?

A. That is right.

Q. From March until the time you were fired, did you

ever refuse to work overtime?

A. No, sir.

Q. As a matter of fact, didn't you welcome it?

A. I welcomed it, I wanted it.

Q. During the nine years that you have been at the plant, has there always been a no smoking rule?

A. Well, it wasn't enforced if there was.

Q. What was this no smoking rule to the best of your knowledge?

A. Well, it seems it was only on occasion when Mr. Schmidt came to the place.

Q. And when did he come, to the best of your knowladge?

A. Well, it seems that that was only after Mr. Schmidt came to the place.

Q. And when was that?

A. I think that was in '44, around '44 and maybe '45, I think.

Q. What was the rule then?

A. Well, we smoked any time we wanted to, then.

Q. Well, was there any particular place set aside for you to smoke?

A. I never heard—for the colored people. There was places where the white people could smoke, in Mr. McHugh's office, or offices on each end of the drive.

Q. But you had no place where you could smoke?

A. Nobody ever told me about any.

Q. How about in the locker room, were you permitted to smoke in there?

A. I wasn't supposed to, they say.

Q. Now, how long have you been smoking in the locker room?

A. Well, I have been smoking all my life.

Q. And during the nine years that you were employed there, did you usually smoke in the locker room?

A. Usually.

Q. There was no other place to smoke?

A. There was no other place to smoke that I know of.

Q. Did any other employees ever smoke in the locker room?

A. They all did as far as I actually knew.

Q. Did you ever hear of any other employee being warned by Company officials not to smoke?

A. Well, I have never been around when it happened, if it happened. Wait now, just a minute—I have heard Mr. Ferst, every time he came in the restroom, he would say, "Watch those cigarettes," or he sometimes would say, "Don't let Bud catch you smoking those cigarettes."

Q. That's Bud Schmidt?

A. That's Bud Schmidt, that's right.

Q. In other words, Mr. Ferst never complained, himself, of the smoking? He said, "Be careful about Mr. Schmidt seeing you smoking?"

A. He never pushed the issue.

Q. Now, after March when you got this overtime work, what kind of overtime work was this, what did you do?

A. That was servicing machines to get them ready for the next morning's run.

Q. Was that a pretty dirty job?

A. It was pretty nasty, you had to handle caustic and wash up around the machines and wash them inside, and the filth that comes out of the bottles is in the machines.

Q. Did you ever take a shower before you went to clean up the machines?

A. It wouldn't do me much good, because this job was dirty all day, and this job was dirty or dirtier than what

I was doing.

Q. In other words, the only time you took a shower was when you finished your overtime work?

A. That is right.

Q. So you would have no occasion to go in the restroom earlier and take a shower?

A. That's right.

Q. What was the usual habit or some custom among the production employees with respect to cleaning up after work?

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A. Well, when the machines ran out downstairs—

Q. Pardon me.

A. When the machines ran out downstairs, then we had a certain portion of cleaning up to do down there before the bottles came out up above.

Q. Now, if the plant was going to quit at 5:00 o'clock, which is the usual hour of quitting, when would you close your soaking machines down?

A. About 20 after four, I think.

Q. Because that is the first step in the process?

A. That is right.

Q. The bottles that went in the soaking machine at twenty minutes after four would come out bottled at 5:00?

A. They would come out before 5:00, sometimes.

Q. At twenty after four, what would you do after that?

A. We would clean up around the machines, the dirt that was accumulated, wash off the machines.

Q. If you were not going to work overtime before you got this overtime job, what time would you go in the restroom?

A. I would have it done about a quarter or ten minutes to 5:00.

Q. And then you would go clean up?

A. That is right.

Q. Did any other employees do that?

A. All the soaker men.

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Q. That is when the work would be finished?

A. That is right.

Q. Was there any particular time the Company set aside for taking showers and cleaning up?

A. No, sir.

Q. In other words, you were supposed to do it on your own time?

A. That is right.

Q. But everybody pretty much got in there by ten to five?

A. Oh, yes.

Q. You weren't the only one?

A. Oh, no.

Q. But at any rate, after March you never did it anyway?

A. I couldn't have.

Q. Now, you have been asked a question on cross examination whether anybody ever asked you, whether anybody ever told you, not to belong to the union, and you answered "not directly". What do you mean by that?

A. Well, Mr. Ferst mentioned that they wouldn't have a union, because they wasn't going to stand for it.

Q. When did he tell you this?

A. It was when he asked me what I knew about it.

Q. At the time he asked you what you knew about it, how was his manner to you? Was it friendly or hostile?

A. It was friendly.

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Q. (By Mr. Kimmell) Now, during the time when this first and second meeting occurred, had you engaged in the distribution of cards, during the time of these two conversations with Mr. Ferst, had you between then distributed the cards?

A. I suppose so.

Q. And talked to Mr. Hoagland?

A. Oh, sure.

Q. Mr. Brooks, after you were given this overtime work, after March, did the Company give you any time set aside between the two jobs in which you could clean up or otherwise prepare yourself

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for the new job?

* * * * * * * * *

A. They didn't give me any time. I would do my cleaning to make time for myself, to go to the lavatory, or what not, you know.

Q. In other words, you would do your clean-up work on the soaking machine a little quicker?

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Recross-examination

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Q. Now, isn't there a large sign at the stairway to the basement, which you use, and which everybody down in the basement uses, reading as follows: "No smoking anywhere in this building"?

A. Yes, there is.

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Q. And how long has it been there?

A. I imagine it has been there ever since I have been there.

* * * * * * *

Q. (By Mr. Glenn) Was there anybody else in the locker room with you when Mr. Ferst came in there?

A. There were.

Q. The day that your employment terminated?

A. Yes, sir.

Q. Who else was in there?

A. Well, now, I don't know. They all ran out as soon as he came in the door. I don't remember just who they were.

Q. And you want to state under oath and that you were not smoking at the time?

A. I wasn't smoking. I put the cigarette in my mouth, but I took it out when he said, "Watch those cigarettes."

Q. Had you lighted it?

A. I don't think so.

* * * * * * *

Trial Examiner Ferguson: What did they run out for?

A. Well, that was the custom whenever he came in there, they ran out.

Trial Examiner Ferguson: Well, what were you doing in

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there? What were they all doing in there?

A. I don't know what they—whatever they were doing, they usually ran out because he would drive them out.

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Redirect Examination

Q. (By Mr. Kimmell) One question, Mr. Brooks, were the employees given any time to go to the restroom?

A. They had a rest period on the machine, the soaking men did.

Q. How long a period was it?

A. Ten or fifteen minutes, fifteen minutes at the most.

Q. Was that once or twice?

A. Twice a day.

Q. The rest of the time you were not supposed to go to the restroom?

A. No.

* * * * * * *

Q. And that was why the employees ran out when Mr. Ferst came in?

A. That is right.

Q. Did you always get this rest period of ten or fifteen minutes?

A. I didn't always get it, because there were a lot of times we would run through the lunch hour and the way they had it arranged for the relief man to come around, he would always get to my machine when it was time for me to go to lunch, so automatically, I could get a relief.

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Q. (By Mr. Kimmell) Isn't it true, Mr. Brooks, before you could leave your machine, a relief man had to come to take your place; isn't that true?

A. If I was going to be gone over three to five minutes or something like that, he would have to.

Q. To take your rest period, the relief man would have to come?

A. He would have to be there.

Q. Very often he didn't get there until lunch time?

A. If we run the machines through 12:00 o'clock, by the

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time he got there, the man helping me always took his first, that threw me to go to lunch after he came back.

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Q. (By Mr. Kimmell) In other words, isn't it true, Mr. Brooks, that very often you had to go to the restroom against the rules in order to follow nature's urge?

A. That's right.

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Recross-examination

Q. (By Br. Glenn) Where are you working now?

A. At Brown & Forman's Distillery.

Q. What sort of job are you doing out there?

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A. I am the janitor.

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Trial ~~Examiner~~ Ferguson: Were you ever laid off or suspended or disciplined—you know what I mean by disciplined, don't you?

A. I think so.

Trial Examiner Ferguson: In all those years you worked there, until this time you were discharged?

A. No, sir, I never was, I never had an unusual trouble. The fact is, I got along as well as the average person got along there with everybody.

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FRANK KAMENISH, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Testimony of Frank Kamenish

Direct Examination

Q. (By Mr. Kimmell) State your name and address, please.

A. Frank Kamenish, 2009 Alexander.

Q. Is that in Louisville?

A. Louisville, Kentucky.

Q. Have you ever been employed by the Coca Cola Bottling Company of Louisville?

A. Yes, I have been employed by them, let's see—

* * * * * * *

A. I went to work for them in April of 1950 and worked for them until May of 1951.

Q. And when you went to work for them in April, 1950, what job were you assigned to?

A. I was hired as a telephone-driver, as a telephone-salesman.

Q. Will you explain what a telephone-salesman is?

A. A telephone salesman is a man that takes extra runs, and

takes out routes like if someone is off sick or on vacation, and as doing general work around the plant like any kind of freight that will come in that they need unloaded, they will get him to help them.

Q. What is the pay on that job?

A. The pay was $39.00.

Q. Were there any commissions to be made?

A. The only time you made commissions is when you took out someone's route when they were off, you made commission.

Q. Now, did you ever have occasion to be transferred to another job?

A. Yes, I was there, oh, for a few months, and West

Central 3 route opened.

* * * * * * * *

A. * * * It is one of their routes, and Mr. Miller asked me if I thought I could handle it, and I told him yes, so he gave that to me, and I took that about the middle of August, sometime.

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Q. Where was this West Central 3 route?

A. It was between 7th and 18th, from Broadway to Walnut, right in the outside of downtown Louisville.

Q. Who was your route manager?

A. Carl Bunning, Sr.

Mr Kimmell: Mr. Skaggs, may we stipulate with respect to Mr. Bunning the same facts we stipulated with respect to the other route manager?

Mr. Skaggs: Yes. You mean Mr. Hartmann?

Mr. Kimmell: That's right.

Mr. Skaggs: Yes, that will be satisfactory.

* * * * * * * *

Q. (By Mr. Kimmell) Now, when was the first that you heard about a union organizing campaign in the plant?

A. The first I heard about it was about, oh, five or six days, I guess, before the first meeting, or something like that. Four, five, six days before the first meeting of the union was supposed to come about.

Q. What month was this?

A. Let's see, the first meeting was in April. I guess this was about the middle of April I heard it.

Q. How did you hear about the union?

A. Now, Mr. Hoagland told me about it and asked me if I would be interested in it.

Q. What did you say?

A. I told him I thought it would be a good deal, that I would go along with it. He said, "We are going to have a meeting later on in the month sometime; I will let you know about it." He said, "In the meantime, find out what you can from different

ones and let me know how they react."

Q. Did you go around and talk to various employees about the union?

A. I talked to seven or eight different ones.

Q. What did you talk about?

A. Just asked them if they heard anything about the union and if they thought they would go to the meeting. I said, "I don't see why you don't come to the meeting anyway and find out what it is all about."

Q. Did you tell them when the meeeting was?

A. At the time I didn't, I didn't know yet.

Q. Did you after that learn when the meeting was to take place?

A. I did.

Q. When was that supposed to be?

A. The last of April, the 25th or 26th, something like that.

Q. Did you attend that meeting?

A. I attended that meeting, that is right.

Q. Did you sign a union card?

A. I did.

Q. What occurred at this meeting?

A. It was, oh, I guess 20, 25, 30 fellows there from the Coca Cola plant, and Carl Saier told us, give us the fundamentals of the union and what their policies are, and everything like that, and tried to show us how the union could help us; and

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when we signed cards and he distributed some cards between the ones that were there, and told us to get as many as we could signed.

Q. Did you take some cards out?

A. I did.

Q. Sometime after this union meeting, did you ever have occasion to talk to your route manager, Mr. Bunning?

A. Oh, it was one time about, oh, a week after, or I think it was about a week or maybe not quite a week, Mr. Bunning come out on my route and met me at 11th and Chestnut, and we were standing there talking. We talked for about a half hour or forty-five minutes, and he asked me first if I went to the meeting. I think it must have been a couple of days later he asked me if I went to the meeting the other night, and I told him yes, and he asked me, "Did you sign a card?" and I told him no, because I didn't think it was any of his business whether I signed one or not, and at that time he told me he had talked to some of the other fellows and one in particular told him he signed a card, and later I talked to this boy and he said he didn't tell him he signed a card.

Q. Going back to the date you had this union meeting, did you happen to attend any other meeting that day?

A. Yes, sir, there was a meeting, the same day that we had the first union meeting, the Company called a meeting.

Q. What time of day was that called?

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A. They called it for 4:00 o'clock, at which time was quitting time.

Q. Was there any previous notice given of this meeting?

A. No, it was the first time they had even told us we

was going to have a meeting.

Q. During the time that you were employed, had the Company ever held other kinds of meetings?

A. Yes.

Q. What kind of meetings were those?

A. Oh, they held sales meetings, and around Christmas time they would have a Christmas meeting, or party or whatever you want to call it, and they would always have a meeting for the Community Chest, for donations; they would have a meeting on that.

Q. Now, speaking of these other meetings, was there any practice of giving notice before these meetings, that you know of?

A. Yes, they was always posted on the bulletin board.

Q. For how long?

A. Oh, I would say they were posted about two or three days ahead of time, anyway.

Q. Had there ever been an occasion before this when a meeting was announced without prior notice?

A. That is the only one I ever remember.

Q. What occurred at this Company meeting?

A. Well, Mr. Schmidt was doing the talking and he said that—he didn't come right out and say anything about the union, but he said, "There is some talk going around, and I have got something here I want to show you." And he had a blackboard there, and on this board he had, "Stop, Look, and Think," or something like that. And then he went on to talk about it and he said nobody would be compelled to join the union and nobody would be forced, you know, to keep them from joining it. And he said he thinks that everybody should make up their own mind and go on and look at both sides of the story and see who would give you the best deal, and then go on and take

it from there. And, at that time, why, then he asked Bill Miller, if Bill had anything to say, and Bill said, "No," and then about that time, Carl Ferst got up and said, "I have." He said, "I want to know what this all about." He said, "What's the trouble?" and he pointed to Austin and said, "What about you, Austin, what's the trouble; what's the matter?" and Austin said, "Well, there's a lot of things going wrong down here, but the only thing that I have really got to squack about right now, if you have got any complaints, you go in the office and tell them about it, and they make a fool and a good one, out of you, like you haven't got any voice to say anything down here." Then he pointed to Del—

Trial Examiner Ferguson: Who is this man you have been talking about?

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A. Carl Ferst—Austin? Ellis Austin is one of the drivers.

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A. * * * Ferst said, "What about you, Del," and he said, "I don't know what you are talking about, Carl," and he asked a few other ones, but I don't remember any more who they were.

Q. Did you ever attend another union meeting?

A. I attended the second union meeting, yes.

Q. About when was that?

A. That was about the first of May, somewhere around there.

Q. What happened at this meeting?

A. At that meeting, there was quite a few drivers, and there was also a lot of colored boys there, too, and they got a lot more cards signed, and also we discussed the union more, and Karl, we decided on trying to organize the whole plant, all the different departments. So, that was about all

that took place there except they was going to wait and see and set the time for another meeting later on.

Q. Do you remember whether anything was done about selecting spokesmen for each department?

A. Well, they talked about selecting a spokesman for each department, they would have to, because there was so many different branches or departments there.

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Q. (By Mr. Kimmell) Now, after this union meeting did you ever have the time to talk to Mr. Miller?

A. Yes, on the date that I was fired while I was getting ready to go home.

Q. What day was this, now?

A. This was on Derby day, May 5th.

Q. That was also Saturday, wasn't it?

A. That Saturday, that's right. I was getting ready to go home and was down by the time clock when Carl Bunning, my route supervisor, said, "Frank, Will wants to see you before you leave," and I went into his office and said, "You want to see me, Will?" and he said, "Yes, Frank, we are going to terminate your employment."

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Trial Examiner Ferguson: Who is Will?

A. Mr. Miller. I said, "You want to see me Mr. Miller?" and he said, "Yes, Frank, we are going to terminate your employment as of right now." And I said, "What's the reason?" and he says, "I don't care to discuss it," and I said, "Okay." And he said, "Here is your slip, go down and get paid." So, I went on down and got paid, and left. As I was getting ready to leave the plant, I met two of the boys coming in, who had just got in, and I told them that I just got fired and I was coming back Monday

to see Mr. Schmidt and find out the reason.

Q. (By Mr. Kimmell) Which boys were these?

A. Carl Bunning, Jr., and Jim Lueke.

Q. They were also drivers?

A. They were drivers, that is right.

Q. Did you go back to see Mr. Miller on Monday?

A. That is right, the following Monday I went back for the purpose of seeing Mr. Schmidt, but he wasn't in his office, and I couldn't find him in the plant, and I didn't think I had a right to run all over the place looking for him, so I went in Mr. Miller's office and I asked him, "I think I have got a right to know why I was fired," and he said, "Well, it's just one of those things." I said, "Will, how about a recommendation?" and he said, "Well, you tell your employer to call me, and I will give you a recommendation." And I said, "What kind will I get?" and he said, "So far as I know, it will be good, because

I have got nothing against you personally, and your work has been satisfactory." And he said, "It's just something come up in a hurry, and something had to be done about it." He said, "That's all I can tell you." He said, "If you want to know anything more, you will have to see Mr. Schmidt." He said, "I will tell you what I can do, though, Frank, I can change your termination slip from 'Fired' to 'Quit', but if I do that, you will have to stand behind me." And I said, "Well, I think that will look better on my record, because I never have been fired from a job before," so he went on and changed it, and I thanked him and went on and left; and that's all there was to that Monday.

Q. What time did you get in on May 5th, Derby Day, the day you were fired?

A. I got in around 10:30.

Q. What time did you usually get in on Saturday?

A. You mean all Saturdays?

Q. Yes, ordinary Saturdays.

A. I got in around 12:30 any time. I was always in before 12:30.

Q. Why is it that you got in at 10:30 this particular Saturday?

A. That was Derby Day, and your trucks are not allowed downtown too long, and you stop and stock most of your dealers heavy the day before, and then you just make the rest of them Saturday,

Derby Day; and that is what I did, and I got in about an hour and a half early.

Q. Was that the usual habit among the drivers?

A. That is right, it is the usual thing they do on Derby Day.

Q. Did you see any other drivers come in about the time you came in?

A. There were some more in, but right now, I can't think—let's see—well, right after I come in, Lueke came in and Bunning came in, and before I was in, Jack Starkey was in before I got in.

Q. How long after you came in did James Lueke come in? You say right after; what do you mean by that?

A. Well, let's see, I was loaded, and I unloaded and cashed out, I would say about 20 minutes after I got in.

Q. Carl Bunning, Jr., is he related to Carl Bunning, Sr.?

A. That's Carl Bunning, Sr.'s son.

Q. You say James Sharkey was in before you?

. . . . . .

A. Jack Starkey was in before I was.

Q. How do you know that, did you see him?

A. No, he told me he was in about 9:00 o'clock.

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Cross-examination

Q. (By Mr. Skaggs) How old are you, Mr. Kamenish?

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A. Twenty-four.

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Q. You are working at the present, are you?

A. That's right.

Q. Where are you working, sir?

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A. I am working for Oertel Brewing Company.

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Q. And where did you go when you left Coca Cola?

A. I didn't do anything for a few weeks and then I took a two weeks' cruise with the Navy. Then I came back and after that I went to work for Browne.

Q. And then you went from Browne—

A. From Browne to Oertel.

Q. To Oertel. Did you use Mr. Miller as a reference when you applied for any of these jobs?

A. I did not.

Q. Did they ask you for references?

A. They didn't.

Q. You also distributed union cards, did you, Mr. Kamenish?

A. I did.

Q. From whom did you procure the cards?

A. I got mine from Karl Saier.

Q. Did you meet with him and Mr. Hoagland from

time to time?

A. No, the only time I met with them was at the union meetings, except Mr. Hoagland, I met with him quite often.

Q. And I believe you said you distributed some seven or eight cards?

A. I didn't make that statement exactly. I said I talked to about seven or eight different ones.

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Q. Well, did you give those people cards?

A. I believe I gave two or three of them cards.

Q. Where did you talk to them, Mr. Kamenish?

A. Well, the ones I talked to were mostly boys that I rode to work with and boys that lived out in my neighborhood.

Q. You say Mr. Bunning came out on your route and asked you if you had attended the union meeting, and had signed a union card?

A. That is right, when he come out on my route, he asked me those questions.

Q. Did he come out on your route for any other reason, Mr. Kamenish?

A. If he did, he didn't state his purpose that day.

Q. Is that all he said to you, just asked you if you had attended a union meeting and signed a card?

A. No, he told me about the time before when they tried to get a union in down there, and that he wasn't for it, and that he thought, just like Bud said, the best thing to do was look at both sides. He said he thought I was more level-headed than to jump into something blind.

Q. He didn't tell you not to go and join the union, did he?

A. Well, he didn't come right out and say not to join it, but he did talk against it.

Q. Were you in any wise threatened by Mr. Bunning?

A. Well, not exactly, but in a roundabout way I guess you

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could say that I was.

Q. Well, what did he say that made you think he was threatening you?

A. Well, the way he talked, it just sounded like there was going to be some of the ones let out, and like I told him, I couldn't afford to be let out because I was a member of the Naval Reserve, and I couldn't take a chance on getting another job, because they wasn't hiring too freely, and I told him I couldn't leap into anything, "I have got to look at both sides," and he said that is the thing to do.

Q. And you told him on that occasion that you had not signed a card?

A. That is right.

Q. And did he tell you anybody was going to be fired?

A. No, he didn't tell me anybody was going to be fired.

Q. Did he tell you anybody was going to be let out?

A. No, he didn't make an exact statement to it.

Q. In other words, that is what you assumed he meant, is that correct?

A. No, not exactly. The way I figured it, they was just trying to throw a scare into us, just trying to break it up.

Q. Well, he told you to be careful and consider both sides?

A. That is right, that is why I considered it to be a scare.

Q. And prior to that in the meeting, Mr. Schmidt had said to you to consider both sides of the proposition and then take

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whichever was the best deal, is that what he said?

A. That is right, but I could see no reason why Mr. Schmidt should know or tell us that, and then have Mr. Bunning come out and tell us.

Q. Mr. Kamenish, during the period of time that you were employed by Coca Cola Company, was your work criticized from time to time by Mr. Miller, by Mr. Bunning, or by anyone else?

A. No, my work was never criticized. I was only called in the office about my work one time.

Q. What was that occasion?

A. That was about the episode, a man said that I refused to make deliveries to him, and the way I was told, I was supposed to have cussed him out.

Q. Well, what were the facts?

A. The facts were, it is when we had this big snow last year, it was about, oh, better than a foot of snow, I guess, in fact, we stayed in two days we didn't put our trucks on the street; and this was on a Saturday, because we had to go out Saturday, because everybody would be out over the weekend; and I was making my route on Broadway, 10th and Broadway, and you couldn't then get into the curb. You couldn't get within three feet of the curb. So, I pulled up in front of this drug store to make the delivery, and when I did, well, I went to back in a little bit; and I got stuck. So, I tried to get out for while, and couldn't get out, and then I went in the drug store and called

the plant and told them I was stuck, for them to send someone to come and get me out. And then I went to the truck and tried to get out again, and finally I seen it was no use trying to get out, so I went in the drugstore, and right after I got in the drugstore, here come the truck to pull me out, so I started out the door, and the man that

runs the Coogle's Dispensary, said, "Hey, are you going to bring my Cokes in?" and I said, "Not right now, I will be back later." And with that, I went on outside; and this man hooked up with my truck and pulled me out and pulled me down the street past the intersection. So, I went on and made some more stops. About forty-five minutes to an hour later, something like that, Mr. Bunning come out on my route and met me and said, "One of your customers called in on you," and I said, "Who was that?" and he told me Coogle, and I said, "What did he say?" and he said, "You gave him a rough time and wouldn't give the man his Cokes." And I said, "I didn't refuse to give him the Cokes." I said I would be back later. And he said, "That's not what he told Bill Milier." And I said "I'm going back over to see him." And with that, I went over to Coogle's Dispensary and went in to see the man and Mr. Bunning followed me over, come up behind me, and I went up to the counter and said, "I understand you called in." He said, "That's right," and I said, "Also I understand you said that I give you a rough time," and he said, "No, I didn't say that," and I said, "Well, I wanted to get it straight, they said you

did and you say you didn't." He said, "If you feel that way, just take the Cokes and don't leave them," and I said, "Okay." I went outside, and Mr. Bunning come in and talked to the man, and talked the man into putting the Cokes back in. That's the only time I ever had any trouble with that man. That night when I come in, I went in Mr. Miller's office to leave him a Cervex ticket of his, and I went in and he was talking to some man, and I laid the ticket on his desk, and he said, "I want to talk to you." I said, "What is it?" and he said, "About that incident that occurred today." I said, "Well," I told him the same

story, just like I told to you, exactly what happened, and I said, "That man had a man worked for Budweiser, tried to get him to lose his job," and I said, "They didn't fire the man, they gave him a better job, on the inside, because he's that kind of a person, that he holds everything against you." And he said, "Well, I wasn't going to let you go out on your route Monday," but he said, "Now, go on and take it out." So, he must have been satisfied with my explanation of that.

Trial Examiner Ferguson: When was that?

A. That was during the big snow.

Trial Examiner Ferguson: I know, but I don't have any idea when the big snow was.

A. February or March, around there somewhere.

Trial Examiner Ferguson: Of '51?

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A. It must have been of '51.

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Mr. Skaggs: I think that I can help, with my notes, Judge. My notes show that it was in February of 1951.

Trial Examiner Ferguson: Is that about right?

A. That's about right.

Q. (By Mr. Skaggs) You mean when Mr. Coogle said to you, when you all had this discussion, he said, "If that's the way you feel about it, just take your Cokes on out", and you just said, "Okay," and picked them up and left?

A. Well, the man was busy, and said, "If that's the way you all feel about it, just take the Cokes and don't leave them," and I felt it was Mr. Bunning's place to talk to him then, because, after all, I had not done what they said I had done. So, Mr. Bunning should smooth it over. He was the route supervisor, and this was one of his stops.

Trial Examiner Ferguson: He was there at the time?

A. That's right, he was there with me.

. . . . . .

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Q. You laid off at the Company for a period of time there, did you not?

A. I think I laid off one time for about two and a half days in a row, that I went to see a doctor about.

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Q. Did the doctor have his office at Churchill Downs, Mr. Kamenish?

. . . . . .

A. Well, at the time I was talking about, and the time you are talking about, they are two different times. I said a period of two and a half days I laid off once, with my side; but the time you are talking about was the race-track, was one day that I took off and I called in previously and told the Company that I was taking my mother to Bardstown to see her relatives, and we come back around, oh, around dinner time, and my mother wanted to go to the race-track, so we went to the race-track, and Mr. Miller saw me at the race-track. That was one time, and it is the only time that he ever saw me at the race-track, and one of the very few times anybody ever saw me at the race track. But, I was not taking off to go to the races, I had stated my reason to the company, it was a policy of the Company to call in if you weren't going to be there.

Q. Who did you call?

A. I called in to the sales department.

Q. Who did you talk to?

A. That is hard to say, different ones answered the phone; sometimes Mr. McHugh, sometimes one of the drivers, or a route supervisor, whoever happened to be

near the phone picked it up. Many a time I have answered the phone myself.

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Q. So you just don't know who you talked to?

A. That is right. Any time I ever called in, I don't know who I talk to, unless it was John McHugh, and I was used to hearing his voice on the phone.

Q. You didn't talk to Mr. McHugh, did you?

A. I wouldn't be able to tell you for sure, because that's been too long ago for me to remember.

Q. How often were you tardy in reporting to work, Mr. Kamenish?

A. What do you mean, absent?

Q. No, I mean tardy, late.

A. Late. I was as late as the boys I rode with, and as often as they were, and that was Harold Bischoff, Maurice Allen, and Castle Humphrey, and J. C. Hackle.

Trial Examiner Ferguson: Did they all work there?

A. Yes, sir.

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Trial Examiner Ferguson: You had a car pool to ride to work?

A. No, sir, we all lived in the same neighborhood and whichever one happened to be going to work at the same time I would be going, they would stop and pick me up, and we would go to work that way.

Trial Examiner Ferguson: Did you all go to work at the same time?

A. No, everybody was suposed to be at the plant at 7:00 o'clock.

Trial Examiner Ferguson: I know, but you named a certain group of men.

A. That is right. Sometimes I rode with Maurice Allen, and Red Humphreys, but they usually left around 7:00 o'clock in the morning. The other times I rode with Hackle, before he went into the service, and Bischoff, and they didn't get there until around 7:00 o'clock, maybe one or two minutes afterwards; but most of the time it was right around 7:00.

Q. (By Mr. Skaggs) Mr. Kamenish, isn't it true that Mr. Miller, as well as Mr. Burning, Sr., was constantly after you about your appearance in wearing your Coca Cola uniform?

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A. * * * And later, I bought me one of the caps,

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as soon as they got my size, and at that time I didn't need the jacket any more, because it was warm.

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Trial Examiner Ferguson: Well, did they have some kind of courses?

A. They had sales meetings and they would have those every so often.

Trial Examiner Ferguson: Did you attend them?

A. Yes, sir, and during the Winter months, I believe they were supposed to have a school for their new drivers, but I was never asked to come to that school, because at that time, I had a route and my route took up the time that they was probably having the school in.

Q. (By Mr. Skaggs) Coming to the 5th of May, where, generally, did this—what general territory did this route of yours cover?

A. Between 7th and 18th, from Broadway to Walnut.

Q. Did you take in 7th Street, also?

A. I took in, let's see, no, not 7th Street. I didn't have

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7th Street. It started at 7th and Broadway and come up Broadway to 18th, and took in 18th, and Madison, and Magazine, and the north side of Broadway, and Chestnut, both sides of Chestnut. That's about all except the side streets in between there, between 7th and 18th.

Q. Traffic conditions aren't too heavy in that area of town on Derby Day, are they?

A. Yes, sir, on Broadway, that's right there by the 10th Street Station where you have your trains coming in, and also on Chestnut Street there is always heavy traffic because that leads into downtown. It's a one way street doing into downtown, and it's only a couple of blocks away from town.

Q. Parking is difficult in that area, then, practically all of the time, is it not?

A. That's right.

Q. When Mr. Miller called you into his office, you say, I suppose shortly after 10:30 because I believe that's the time you said you got in from your route, was it not?

A. It was 12:00 o'clock when Mr. Miller called me into his office.

Q. Didn't you discuss the continuing poor quality of your work at that time?

A. No, he didn't.

Q. He didn't direct your attention to the faults of your work?

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A. No.

Q. Mr. Kamenish, isn't it true that Mr. Miller called you in and talked to you about the deficiencies in your

work, especially in coming in so early from your route, of being late, of failure to garb yourself properly from time to time, and that you lost your temper and quit?

A. No, sir.

Q. But you did decide Monday that you had quit when you went back there again, is that correct?

A. No, sir, I didn't decide that I quit. Mr. Miller told me that he could change my termination slip from "Fired" to "Quit" and I told him I thought that would be better because I had never been fired from a job before, and he told me I would have to stand behind him if he did it.

Q. You saw Mr. Sheehan on May 5th, didn't you?

A. I saw Mr. Sheehan the second time I went in Mr. Miller's office on May 5th, that is, after I had already been fired.

Q. What did you go in Mr. Miller's office a second time for?

A. We had a cooler contest on at that time, and for every cooler you sold, you got $6.00 credit, and that was not included on my pay, so I went back to ask Mr. Miller about that and Mr. Sheehan was present at that time and Mr. Miller said, "That's right, you have got credit for that coming to you," and so he called the cashier and told him to give me an extra $6.00.

Q. Also on that occasion you were given a week's vacation

pay you had coming to you; I believe?

A. I got that previously, after he fired me, he gave me my slip and told me to go down and get paid, that is right, the vacation pay was included in there.

. . . . . .

Q. (By Mr. Skaggs) Getting back to Mr. Coogle, out at that stop at this dispensary at 14th and—wait a minute

—10th and Broadway, did Mr. Bunning have to insist that you go back to service that stop?

. . . . . .

A. Mr. Bunning said, "Come on, we are going to take ten cases in." I said, "I thought he didn't want them." He said, "No,

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he's changed his mind." And I said, "All right."

. . . . . .

Q. Mr. Kamenish, here is what I mean: I had understood that you had gone in to Mr. Coogle's place, and that he was busy, and when you said, related what you had understood he had said, when he called in, he said he didn't, at some point along the way, he said, "If that's the way you feel about it, take your Cokes out," and I understood you did take it out.

A. There had been none taken in at that time. Mr. Bunning and I both went in, just walked in; we never had taken any Coca Cola in to the place then.

Q. Did you go in there willingly, or did Mr. Bunning have to insist that you go in and talk to him?

A. No, I went in willingly, because I wanted to find out what the mix-up was, because I knew I hadn't told him what Mr. Miller said I told him, and he justified my statement that I did not say that.

Q. And you were rather vigorous in your statement to Mr. Coogle?

A. No, all I said, all I said, "I think somebody done me wrong, because they say you said it and you say you didn't."

Q. Well, you agreed with Mr. Miller it would be better if

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you quit your job than to be fired, did you not?

A. No, I didn't agree that it would be better that I quit; I agreed it would be better if my termination slip showed I quit, and was not fired, as a viewpoint of getting another job.

Q. Mr. Kamenish, isn't it true that you actually quit your job and then you found out that you weren't eligible for unemployment compensation insurance, if you voluntarily quit, then was when you made up your mind that you had been fired?

A. No, sir, Mr. Miller told me that day that "if I change this, you won't be eligible for unemployment compensation." And I said, "I know that." And he said, "Well, if you want to do it, why, I will do it, I will do it, but you have to stand behind me." So, I said, "Well, I think it would look better on my record that way," and that's what he done.

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Examination

Q. (By Trial Examiner Ferguson) This incident involving Mr. Coogle, * * *

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Q. Your truck was stuck in the snow, you say?

A. Yes, sir.

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Q. Well, how near Mr. Coogle's place was all that?

A. That was right in front of his place.

Q. Right in front of his place?

A. Yes, sir, it was in a bus stop.

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Q. Well, why couldn't you, while you were standing there, why couldn't you unload the ten cases?

A. That was my original intention, to come in—he didn't say he wanted ten cases, see, I hadn't asked the man yet what he wanted when I got stuck in front of his place. My intentions were, I was going there to make his stop, but when I got stuck, my first intention was to get a truck to pull me out,

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so I could make my route; so I come back and tried to get out myself, and the more I tried, the deeper I got in; and the second time I went in, it was cold then, and I went in to warm up, and right after I got inside his door, the truck came to pull me out.

Q. And where did the truck take you when it pulled you out?

A. It was on the east side of 10th Street, and when he finally got me out into the clear, I was about five or six doors down on the west side of 10th Street, on Broadway.

Q. Then you went on down your total route?

A. I went on down to 11th, and caught the stops on the 11th, and made 12th, and when Mr. Bunning saw me, I was on 12th Street, and he told me about Coogle calling in on me.

Q. You were going to go back to Coogle's, is that right?

A. That is right, I had to go back there because when I pulled away from there, I missed Gordon's at 10th and Broadway, on the other corner, and Tony's and Roy's place, and about four stops on the other side of the street I had to make, so I figured I would come in on 10th Street and park alongside Gordon's to make Coogle's, Gordon's and the ones on the other side of Gordon's.

Redirect Examination

Q. (By Mr. Kimmell) Talking about this time when the truck pulled you out, why didn't you turn around and go

back to Coogle's?

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A. Right there, that would have been making a "U" turn, on Broadway, and I was afraid of getting a ticket.

Q. And you were afraid of backing up because you would get stuck again?

A. If I would have backed up, I would have had to back across an intersection.

Q. That is why you went on?

A. That is right.

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Q. And you say you had a conversation with Mr. Miller about it?

A. That night when I come in.

Q. Did Mr. Miller ever talk to you again about that?

A. No, sir, it was the only thing ever said about it.

Q. And he told you he was going to penalize you, but changed his mind after hearing your explanation?

A. He didn't say "penalize", but he said he wasn't going to let me take my route out Monday.

Q. And what did that mean?

A. That he wasn't going to let me take my route out, I guess a sort of punishment.

Q. You would lose your commissions that day, wouldn't you?

A. That is well right, I wouldn't make commissions that day.

Q. When was this time you took off a day to go to Bardstown?

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A. It must have been in October, because he seemed to state that was the day.

Q. October, 1950?

A. Was it 19—it might have been 1950.

Testimony of Frank Kamenish

Q. Well, you were employed from April, 1950 to April of 1951. That is when you went to Bardstown?

A. I did go to Bardstown that morning.

Q. About what time did you reach Churchill Downs?

A. Oh, we was there, I would say, at 1:30, anyway; 1:30 or 2:00 o'clock.

Q. Was it the usual practice for drivers to take off a day if they had some personal business?

A. That is right, you could take off if you had something to do, as long as you called in and treated them with courtesy, and told them you weren't going to be there, and they could make arrangements for somebody else to take out your route, as long as you didn't put them in a hole.

Q. Now, there's been cross-examination, testimony about being in proper uniform. When was the first time that Mr. Miller spoke to you about not wearing the proper uniform?

A. The first time he spoke to me about it was right after they posted a notice on the bulletin board not to wear it, and it was not only to me that that notice was posted, it was about six or seven other boys, quite a few of them were wearing baseball caps.

Q. Who else were they?

A. Some of them Carl Bunning, Jr., for one wore it; Harold Herstoll; Al Mattinglee; Bill Shadd; and a boy by the name of Bob Neeley, and there were others, a boy by the name of Ludwig, and there were some others too, but I can't remember their names right now.

Q. After Mr. Miller spoke to you about wearing a baseball cap, what did you do?

A. I went in to see if I could get me a cap. I asked Miss Day for it.

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Q. (By Mr. Kimmell) What did Miss Day tell you?

A. I asked her for a 7½ and she said they didn't have a 7½ right then, and when she got one, she would let me know, and I said, "Okay."

Q. Did she ever let you know?

A. No, she never did let me know for sure, but Mr. Miller caught me wearing a cap another time, one day it was raining, on the route, and he told Mr. Bunning to come see me, talk to me again, and Mr. Bunning came and talked to me, and told me about wearing this hat, and then I went down and talked to Miss Day, and she had a hat there and I bought the hat.

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Q. And you no longer needed the jacket?

A. That is right, it was warm then.

Q. Now, do you remember any time when you refused to attend any training session?

A. I never refused to attend any training session.

Q. You did attend some training sessions?

A. I attended every one I was supposed to attend.

Q. Did you ever make any remarks at these sessions which would indicate that you were not in favor of them?

A. No, I was never even questioned at any of these training programs they had.

Q. Mr. Kamenish, directing your attention again to this Coogle incident, how much snow was there there?

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* * * have been a lot easier and much faster and much safer.

Q. And that's the reason you didn't make delivery the first time?

A. That wasn't exactly the reason; I really had forgotten about making deliveries because my main worry

at that time was getting my truck pulled out of the snow.

Q. You were in the bus stop?

A. That is right, I was in the bus stop, where the bus had to pull in to stop.

Q. And you sat in the car and tried to get out yourself?

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A. I sat in the truck and tried to get out, and the wheels just kept on spinning.

Q. What was the time for reporting in the morning?

A. 7:00 o'clock.

Q. From your observation, did your fellow employees, your driver-salesmen, usually come in at 7:00 o'clock?

A. Well, the ones that had the largest routes usually came in around 6:30, and would leave around 7:00. The ones that had the Class D routes and C routes usually would get there anywhere from ten to seven to maybe five after seven.

Trial Examiner Ferguson: What was your route?

A. My route was a "D" route, the lowest type route they had, and it was not far from the plant. Most of the boys that had those low-class routes would always get in around that time, around 7:00 o'clock, before they would go out. They didn't have to be in a great big hurry of getting finished, because they didn't have that much business to do.

Q. What time did you usually get in?

A. You mean in the mornings?

Q. Yes.

A. I got in around 7:00, maybe sometimes it would be a couple of minutes after 7:00, maybe it would be five minutes before, ten minutes before, and maybe the latest would be five minutes after, was the latest I ever got to work except when I was delayed by snow or something

like that.

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Q. At the times you did come in late, you were usually accompanied by another employee that you came to work with?

A. That is right, sometimes one or sometimes two.

Q. Do you remember how many times you came in late?

A. I really couldn't tell you, but I know it was a habit for this one boy I was with to never get there on time, and I know he was never bawled out for it, because he was well liked by the Company.

Q. Did anybody every say anything to you about coming in late?

A. No, nobody ever said anything to me about coming in late.

Q. Did the Company ever say anything to you about this time you went to Churchill Downs?

A. There was never—let's see, I don't think there was ever anything mentioned to me about that until today, except when I had a hearing with the unemployment bureau, with Mr. Miller and Bud Schmidt, that was one of the charges they brought against me, and I think that was the first I ever heard them talk about it.

Q. What happened at this unemployment hearing?

A. Well, they claimed that I quit and I claimed I was fired, and when I applied for unemployment insurance, I was refused, so I appealed it, and we had a hearing and in the hearing, well, the case was reversed in my favor, • • •

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Mr. Kimmell: • • • Mark as General Counsel's Exhibit 8, a document of one page, called "Notice of Adjusted

Determination," dated June 20, 1951, and signed by John Duvall; and as General Counsel's Exhibit 9, a typewritten document consisting of two pages, on the letterhead Division of Unemployment Compensation Insurance, Frankfort, Referee Decision, dated July 17, 1951.

(Thereupon the documents above referred to were marked for identification as General Counsel's Exhibits 8 and 9.)

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Trial Examiner Ferguson: Overruled. They will be admitted

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in evidence.

(Thereupon the documents heretofore marked for identification as General Counsel's Exhibits 8 and 9 were received in evidence.)

Q. (By Mr. Kimmell) Did the Company ever complain to you about coming in late?

A. They did not.

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Recross-examination

Q. (By Mr. Skaggs) Mr. Kamenish, how did your truck happen to get stuck there in front of Coogle's?

A. Well, I was making deliveries coming down Broadway, and when I got to this one particular spot, I must have gotten in a little bit too close to where all the snow actually was piled, and my wheels got stuck and wouldn't pull me out.

Q. You had stopped there for the purpose of making a delivery?

A. That is right.

Q. And you were going to deliver to Coogle's at that time, were you?

A. I was going to back up past the bus stop and get out of the bus stop, and deliver to Coogle's, and when I backed up, that is when I backed up into the snow and got stuck.

Q. If you had backed up there as you intended to, you would have crossed that little snow bank that had been pushed up by the snow plow, wouldn't you?

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A. I would have backed straight back probably, to get a parking place. I didn't swing my rear end into the curb, but I wanted to back a ways from the corner so the bus could pull in.

Q. When you made deliveries up and down Broadway during this period of time, it was necessary that you go over the snow that the snow plow had pushed up, at two places other than Mr. Coogle's, was it not?

A. That is right, except some places had a path beat directly in front of their door, on out through the snow, and you could walk out to your car.

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Q. You were there some 20 minutes, I believe you said before somebody came to pull you out?

A. That is right.

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Q. You didn't spin your wheels for 20 minutes trying to get out, did you?

A. No, not all the 20 minutes I also put pieces of cardboard underneath the back wheels and kept shoving it down, hoping I could get a hold and pull myself out.

Q. Was that before or after you called the Company?

A. That was after I called the Company.

Q. Well, you had plenty of time in that 20 minutes to make delivery of Coca Cola to Mr. Coogle, didn't you?

A. I would have, if I hadn't been trying to get my truck out, I would have gone ahead and made the delivery.

Q. I understood you called the Company to come and snake you out.

A. That is right, but still I think it is human nature to try to get out yourself. I don't care who it is, if you think there is a chance to get out, you take that chance.

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Examination

Q. (By Trial Examiner Ferguson) Now this is Mr. Miller you were having these dealings with, he is the fellow you said discharged you, is that right?

A. Yes, sir.

Q. And when was it that you had this talk with Mr. Miller about letting the records show that you quit, rather than that

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you were discharged?

A. I was fired on a Saturday.

Q. On the 5th of May, you were discharged?

A. And Monday, that would be two days later, the 7th.

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Q. All right, you understood that you couldn't get unemployment compensation if you quit?

A. That is right.

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Q. But you agreed the slip should show that you quit?

A. I didn't agree it should show, he said he could do it, but whether he did it, I don't know. I seen him erasing something and marking something; what he marked, I don't know, and he could have changed it after I left.

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Q. Well, you understood he was changing it to "quit," didn't you?

A. Yes.

Q. Then you went down and claimed unemployment compensation, didn't you?

A. That is right, because there was a friend of mine that had quit a job and he went down and he drew it. I guess the Company didn't fight it or something. But, Coca Cola fought mine, but I thought, "Why not take a chance on it." I mean, I was off from work.

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FRANK R. McCOY, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

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Q. (By Mr. Kimmell) State your name and address, please.

A. Frank R. McCoy, sir.

Q. Where are you employed, Mr. McCoy?

A. 217 South Jane.

Q. Where are you employed, Mr. McCoy?

A. At the Coca Cola Bottling Company.

Q. And when did you start work there?

A. In July, about three years ago.

Q. Are you presently employed by the Company?

A. Yes, sir.

Q. You are appearing in this hearing, in response to a subpoena?

A. Yes.

Q. What is your job at the Company?

A. I am working on the run, taking off empty cases and feeding the run during the day.

Q. What is a "run"?

A. That is the conveyor that leads to the machine, where it bottles.

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A. That is the run, that leads to the machine, where the bottles are to be fed into the soaker. I put the cases on the run and help to unload the trucks in the afternoon.

Q. I take it, then, you unload empty Coca-Cola bottles, place them on the conveyor belt where they go to the soaking

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machine?

A. That is right, during the day.

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Q. (By Mr. Kimmell) From where you work, are you in constant view of the soaking machines?

A. At different times.

Q. Well, have you ever observed the operations of the soaking machines?

A. Yes, I have worked on them.

Q. Now, of your own knowledge, how many men work on a soaking machine?

A. Eight.

Q. On each machine?

A. Yes, until they got the new automatic machines.

Q. Oh, you have automatic machines?

A. Yes.

Q. How many work on it?

A. One runs it, that is, on the first one, and on the second one at times they have two, but most of the time they have one.

Q. How about Thomas Brooks' machine?

A. That machine was, at the time he was working there, was two men on the machine. Now, it's been converted.

Q. At the time he was working there, were these two men

always on the machine?

A. Yes.

Q. Could one of the men leave for any period?

A. Yes.

Q. For how long?

A. Oh, two or three minutes, maybe longer, it is according to how well the man he was working with was qualified to do the work.

Q. Now, did you join the Union?

A. Yes.

Q. And when did you join the Union?

A. Roughly speaking, after the first meeting, whenever that was held?

Q. Was that sometime in April?

A. I imagine so.

Trial Examiner Ferguson: Did you attend the first meeting?

A. No, I did not.

Q. (By Mr. Kimmell) Did you attend the second union meeting?

A. I did.

Q. What occurred at the second Union meeting?

A. Well, they were trying to get a round-out of ideas of what the employees wanted, and to see if there was enough that would sign authorization cards to petition the National Labor Relations Board.

Q. Now, do you remember whether anything was said at this

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meeting about selecting spokesmen?

A. Well, to get a round-out, a round-out of ideas, instead of each one getting up and speaking his own, I believe that they selected Thomas Brooks from our bunch in the basement, to get a round-out idea of what the basement employees wanted.

Q. He was to be your spokesman?

A. Yes.

Q. And you employees selected him?

A. Yes.

Q. Why did you select Brooks?

A. Well, because at the present time he seemed to have more knowledge of Union activities, or he knew just a little bit more about it than the rest of us at the present time knew, and questions that we wanted to ask, we could consult him and possibly he could straighten it out within our minds.

Q. Now, sometime about the time that you joined the Union, and attended these meetings, did you ever have a conversation with Mr. Sargeant?

A. I did.

Q. About when was that?

A. That was after the meeting the plant had at 8:00 o'clock one morning; in the afternoon, he spoke with me.

Q. Was this after you signed the card?

A. It was.

Q. Now, tell the Trial Examiner in your own words

what this

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conversation was.

A. Well, I was on my way upstairs to buy a Coke, and Sargeant came to me and said, "Frank," he said, "Did you sign one of those cards?" . . .

. . . . . .

A. And I asked him what cards, and he said, "The meeting this morning", and I interrupted. I said, "Yes, the meeting this morning sounded as if they are trying to get a union in." And, he said, "Well, did you sign one of the cards?" And I said, "It is like this, Sargeant, if the majority of them want it, I want it, too." And he said, "Well, you might lose your job over it." I said, "I still say, if the majority of them

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want it, I want it, too."

Q. (By Mr. Kimmell) Now, "This meeting this morning", what are you referring to?

A. That was a plant meeting.

Q. Oh, a meeting called by management?

A. Yes.

Q. Held that morning?

A. Yes.

Q. What occurred at this meeting?

A. At that meeting, Mr. Schmidt spoke, and I vaguely remember, he had a blackboard with the words, "Think" on it, and he did make the statement about, "You can belong to any church, any lodge, go to any school,"—he named a few of the schools—"be of any race, and still work here." And he also said, "you can even have a union and still work here." And, well, it was a very short meeting, and we went on to work.

Q. And the conversation with Mr. Sargeant took place

after this meeting?

A. That took place that afternoon.

* * * * * * * *

Q. (By Mr. Kimmell) Now, this meeting that was held in the morning, was that for all the employees or just for the

colored production employees?

A. That was for the production department as a whole, both white and colored.

Q. Were there any drivers-salesmen there?

A. I didn't see any.

Q. At this meeting, was there any prior notice given of it?

A. Not until 8:00 o'clock that morning when I was coming to work.

Q. Had the Company ever held meetings previously in the plant?

A. Yes.

Q. What kind of meetings were they?

A. Plant meetings, and Red Cross, Community Chest, sir.

Q. Was it custom or not to give notice of these meetings?

A. Beforehand, I believe there had been.

Q. How many days' notice would you usually get?

A. Sometimes two or three.

Q. Do you ever remember of a meeting which was on short notice such as this meeting?

A. No, I do not.

Q. Well, do you smoke?

A. I do.

Q. Is there any place in the plant where you can smoke, where you are permitted to smoke?

A. No.

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Q. Well, do you usually smoke in the plant?

A. I do.

Q. Well, where do you smoke?

A. In the dressing room, in the plant itself at times, when it is cold and I don't want to go out.

Trial Examiner Ferguson: Is that the place they also call the locker room?

A. Yes, sir.

* * * * * * *

Q. About how many times have you smoked in the locker room?

A. Too numerous to count.

Q. Was it common practice for the employees to smoke in the locker room?

A. If no one was around, they would.

Q. Has Mr. Sargeant or Mr. Ferst ever seen you smoking in the locker room?

A. Yes.

Q. What did they say at those times?

A. Mr. Ferst said, "Some of these times it is going to be Bud walking in on you instead of me."

Q. By "Bud", you mean—

A. Mr. Schmidt.

Q. Did Mr. Ferst tell you to stop smoking?

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A. Yes.

Q. But you continued to smoke at other times?

A. Yes.

Q. Why is that?

A. Well, because the only place we had to smoke is on the outside platform, or by the double doors, garage doors, and at times it is very cold, like today, to go outside

and take a smoke, and sometimes during our work, in order to keep our work up, we have to be right on the job, and you can't be running off when you don't have a relief man.

Q. Well, those times when Mr. Ferst told you not to smoke, did you take him seriously?

A. Yes.

Q. But you continued smoking?

A. Yes.

Q. You never saw him fire anybody for smoking, did you?

A. No.

Q. Now, what time did you finish your work on the conveyor belts? I mean, on an average day which ended at 5:00 o'clock, what time would you be finished?

A. It is according to the time the trucks come in.

Q. Well, I mean, can you generalize about it?

A. Sometimes it is a quarter past, sometimes it is 4:30.

Q. Now, if it were 4:30, what would you do until 5:00 o'clock?

A. Clean up my run, or see that my cases were stacked in the correct position. If my work was caught up, that would be all.

Q. Did you ever take a shower before you left?

A. Yes, sir.

Q. What time do you usually go into the shower room?

A. Sometimes it would be 20 minutes of five and sometimes it would be five minutes to five, because we have worked up until five minutes until five.

Q. What time do other employees go into the shower room?

A. Whenever they are finished with their work.

Q. What time would that usually be?

A. Well, the time would vary.

Testimony of Frank R. McCoy

Q. Well, what time would it be? Before 5:00 o'clock?

A. Yes.

Q. You mean then, as a general rule, employees took their showers before 5:00?

A. Yes.

Q. Did you ever see Thomas Brooks distribute cards to other employees?

A. Yes.

Q. About how many times did you see him do that?

A. Once when he gave me my card.

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Cross-examination

Q. (By Mr. Skaggs) Mr. McCoy, when Brooks was selected as spokesman for the colored employees downstairs, do I understand that to mean as spokesman in the event the Union should be negotiating with the Company?

A. No.

Q. Well, what was he acting as spokesman for, for whom?

A. For the group as a whole, as to the wants of the employees, in the basement, or the colored employees that were working there.

Q. Well, I had the idea you said that you selected him because he knew more about union activities and functions than anybody else. Was he to act as a spokesman—who was he going to speak to, in other words?

A. In other words, we were supposed to get the ideas of what we wanted, what we were asking for, what we were trying to get, tell him, and he, in turn, would speak at the meeting instead of everyone jumping up and giving different ideas, the ideas would be collected together.

Q. Now, I understand he was to act as spokesman for

your group in future union meetings, is that correct?

A. Yes.

Q. I see. Now, let's come to this meeting in the morning. Do you have any way of identifying the date of that?

A. No, I do not.

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Trial Examiner Ferguson: Well, in reference to other things that happened, can you tell when it was? For instance, the second union meeting, was it before or after that?

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* * * —was this meeting in the morning that Mr. Schmidt spoke, was that before or after you attended this union meeting?

A. That was after I attended the union meeting.

* * * * * * * *

Q. Now, Mr. Schmidt, that morning, in the meeting, I believe you said had a blackboard, and made it perfectly clear to anyone that whether or not he joined a union was his business is that correct?

A. That is right.

Q. He also made it clear to them that whether or not they joined the union, that would not be either way, a condition of employment in the plant, is that correct?

A. That is right.

Q. Did he say anything that morning that was in any wise threatening to any employee?

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A. No, not to my knowledge.

Q. Well, you were there?

A. Yes.

Q. And you heard him?

A. Yes.

Q. Well, now, would it be fair to say the employees of the Coca Cola Bottling Company considered Mr. Martin Schmidt, Mr. Bud Schmidt as he is generally called in the plant, as the "Big Boss"?

A. Yes.

Q. In other words, he is over Mr. Ferst and Mr. Sargeant and Mr. Miller?

A. That's right.

Q. So when Mr. Sargeant said to you you might lose your job, that didn't disturb you in the light of what Mr. Schmidt had said, did it?

A. No, sir.

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Q. (By Mr. Skaggs) At that time you told Mr. Sargeant that you had not signed a card? Did you tell him that?

A. I didn't give him any answer as to whether I did or whether I had or had not.

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Q. Your statement was that you were with the crowd, and whatever the majority wanted was what you wanted?

A. That is right.

Q. You wouldn't have us understand that smoking goes on openly in the production department of the Coca Cola Bottling Company, would you?

A. It does.

* * * * * * * *

Q. I understood you to say that the only place the people smoked was in the locker rooms.

A. For the colored department, yes.

Q. All right—

A. Not only in the locker rooms, but in the plant itself.

Q. Outside, while people are working, they smoke?

A. They do.

Q. They do it when Mr. Sargeant is around?

A. They do.

Q. When Mr. Ferst is around?

A. They do.

Q. Yet you say he warned you about smoking?

A. He did.

Trial Examiner Ferguson: Are you actually speaking about in the plant or outside?

A. Inside the plant.

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Q. (By Mr. Skaggs) Well does he just run around warning people all the time, Mr. McCoy?

A. No, I imagine not, if he catches them.

Q. Well, I thought you said they smoked openly?

A. They do.

* * * * * * *

Q. I say, you never go there to take a shower or clean yourself up, before you finish your duties that particular day?

A. No.

Q. And the Company does permit people, when they have finished their duties in the day, if they get through a little

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ahead of time, they are permitted to go take a shower, is that correct?

A. That, I could not answer.

Q. But you do wait until 5:00 o'clock, generally, to check out, unless of course, you are going to work overtime?

A. That is right.

Q. You are still working at Coca Cola, I believe you said?

A. I am.

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Q. You never saw Mr. Thomas Brooks distributing cards to anybody except yourself, did you?

A. No, I did not.

Q. Where did he give you your card?

A. In the dressing room.

Q. Of the plant?

A. That's right.

Q. During working hours?

A. No.

Q. What time was it?

A. Lunch time.

Q. Did he have those cards in his pocket?

A. That, I couldn't say. He had the one he gave me in his

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hand.

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Redirect Examination

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A. He asked me did I sign one of those cards. I said, "What cards?" He said, "You know the meeting this morning." I said, "Yes, the meeting this morning sounds as if they are trying to get a union in here." He said, "Did you sign one of the cards?" and I said, "It is like this, Sargeant, if the majority of them want it, I want it, too." I walked away from him then.

Q. Then what did he say?

A. If he said anything he said it after I walked away.

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A. Well, so to speak, if the Company found out that I signed a card, I might lose my job, was my thought.

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Q. (By Mr. Kimmell) Did you take Mr. Sargeant seriously?

A. I did.

Q. He wasn't kidding, was he, so far as you could see?

A. He wasn't as far as I could see.

Q. And he is your basement manager?

A. He is.

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CARNIE BROOKS, a witness called by and on behalf of National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) Mr. Brooks, state your name and address, please.

A. Carnie Brooks, 527 South 17th Street.

Q. Is that in Louisville?

A. Yes, Louisville, Kentucky.

Q. Where are you employed?

A. Coca Cola Bottling Company.

Q. How long have you been working there?

A. Well, I have been working there previously, the last five years. I worked there before.

Q. Are you presently employed there?

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A. Yes, I am.

Trial Examiner Ferguson: You have been working

there continuously for five years?

A. Yes.

Q. (By Mr. Kimmell) Are you related to Thomas Brooks?

A. I am.

Q. What is the relationship?

A. Brothers.

Q. Now, do you remember a time during the month of April, 1951, when you and your brother were at a bus stop and had an occasion to run into Hoagland?

A. I do.

Q. Was that meeting by prearrangement?

A. No, it wasn't.

Q. Now, how did Hoagland arrive at this meeting?

A. Hoagland? Well, me and my brother was coming up Hill Street, and Hoagland come up in a car, and Hoagland got out at 15th Street, and we went over there to talk to him.

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Q. (By Mr. Kimmell) And you saw Hoagland get out of Carl Ferst's car?

A. I did.

Q. What did you talk about at that meeting?

A. Well, about the union; did we fellows want to be in the union.

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Q. Now, did you sign a union card?

A. I did.

Q. And did you attend any of the union meetings?

A. I did.

Q. Now, what occurred—when was the first union meeting you attended?

A. Well, I don't remember that date, but it was back when they first started organizing the union.

Q. Was that sometime around May first?

A. I guess so, when they first started.

Q. Now, what occurred at this meeting?

A. Well, it was a regular union meeting with the brewery workers, and then later on they got into our case, discussed our case about letting us come into the union.

Q. Now, do you remember at this meeting, whether your brother was elected as the spokesman?

A. Yes, we few fellows that were present, we needed a spokesman, so we choose him to be our spokesman.

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Q. (By Mr. Kimmell) Now, sometime after this union meeting, did you ever have occasion to talk to Carl Ferst?

A. I did.

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Q. About how long after this union meeting was it?

A. Oh, I would say the following week.

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Q. (By Mr. Kimmell) Where was it you ran into him?

A. I was on the south side, on the platform, smoking.

Q. Was this during the recess, I mean the rest period?

A. Yes, it was on my relief, off the machine.

Q. And Carl Ferst came up to you?

A. Yes, he come up to me.

Q. All right, now, tell the Trial Examiner what he said to you and what you said to him.

A. Well, Carl Ferst said to me, he said, "I am sure surprised in you Brooks' boys," and I said, "What do you mean?" He said, "Don't be a fool, boy." And then he said to me, "You are not going to get nothing out of this union." Well, I laughed.

Q. Did Carl Ferst ever talk to you again?

A. No, not about the union.

Q. Well, did Carl Ferst ever talk to you about getting rid of the colored boys?

A. Yes, down in the basement the same day they were talking to me on the platform, later in the evening, about quitting time.

Q. He came down in the basement?

A. He came down in the basement and talked to all of us.

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Q. What did he say?

A. He said Bud told him he had to get rid of all the colored boys, and in two months' time he would have all white fellows.

Q. Did he make this a public announcement?

A. Yes, a public announcement; everybody could hear it, all over the place.

Q. Did he say why he had to get rid of the colored boys?

A. Because Bud was on his back about the colored boys and the union coming in and they were going to get new machinery and get all of us out of there in two month's time.

Q. Mr. Brooks, do you smoke?

A. I do.

Q. Do you know whether there is any place in the plant where you are permitted to smoke?

A. Not other than on the platform outside and down there where the trucks come in the door to unload.

Q. There is no place on the inside?

A. No.

Q. Did you ever smoke in the plant?

A. I did.

Q. Where did you smoke?

A. In the dressing room, sometimes I took a chance

on the run on the machine I worked at.

Q. Have you ever been caught smoking?

A. I have.

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Q. How many times?

A. Well, I would say two times.

Q. Who caught you?

A. Bud Schmidt.

Q. What happened when he caught you?

A. Well, the first time I was in the dressing room, myself and another fellow, smoking, late in the evening, about 5:30, getting off, and he walked in and I ditched my cigarette, but the other fellow, he had a cigarette in his hand or mouth, which, I don't know, and he asked us about McLouie's key to his locker, or something like that, then he walked out, and then later on he caught me and my helper on the machine smoking right before working time.

Q. What did he say?

A. He told us to put on our clothes and go home.

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Q. (By Mr. Kimmell) Did he tell you how long to stay home?

A. No, after I went and undressed and prepared to go home, I went up to the office to see Carl Ferst and took my time card with me and Bud was in the office with Carl Ferst.

Q. Did you ask him how long you were to stay home?

A. I wanted to see if I was fired or not.

Q. Did you talk to Carl Ferst?

A. Carl Ferst and Bud, both was in the office then.

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Q. What did they say to you?

A. Well, Carl—

Q. Just take your time, Mr. Brooks, no rush.

A. Well, Carl asked me, "What is the matter with you boys down there?" and I told him I had been caught for smoking, and then Bud said—or Carl said, said to Bud, "What do you want to do about it?" and Bud says, "It looks like to me if the boys can't get along with the rules around here, they ought to seek employment some place else." Then Carl Ferst looked at me and then he asked Bud again, "What do we want to do about it?" and Bud said he didn't know.

Q. Did they ever tell you how long you were laid off?

A. I was laid off for the day; but before then he asked him what he wanted to do about it, and he said, "Well, if the boys think they can keep up with the rulings, they can go back to work." Carl Ferst asked me what I thought about it and I said, I said I could keep up with the rules. So, he asked Bud what did he want to do about it and he told him to let me go off for that day, Friday, and come back to work Saturday.

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Q. (By Mr. Kimmell) After you came back to work were you ever caught smoking again?

A. Yes, by Clarence Sargeant.

Q. The next day you came back to work you smoked?

A. Yes.

Q. Clarence Sargeant actually saw you?

A. Yes.

Q. What did he say to you?

A. He said, "Put the cigarette out," Bud was kicking about it.

Q. Did you ever hear anything from Bud Schmidt about it?

A. No, I didn't; he didn't report.

Q. Now, did Carl Ferst ever catch you smoking after

this time?

A. Yes, about six or seven times more.

Q. What did he do those times?

A. Just told me to put the cigarette out.

Q. Did you ever hear from Bud Schmidt about it?

A. No, I didn't.

Q. Did you ever see anybody else in your department smoke?

A. Yes, we all smoked in the dressing room.

Q. Now, you worked on a soaking machine?

A. Yes, I do.

Q. That is the same type of work your brother does?

A. Yes.

Q. A different machine, though?

A. At present it is different, but at the time my brother was there it was the same kind of machine.

Q. The same kind of machine, but a different machine?

A. Yes.

Q. Did you work with somebody else on the machine?

A. I worked with Lumey Wayne on the machine.

Q. Now, when you worked on that machine, did you have to be there constantly?

A. Well, I did.

Q. Did you have to be there all the time?

A. I could kill maybe two or three minutes, my helper could help or hold it that long.

Q. But otherwise you had to be there?

A. Yes, I had to be there.

Q. What time did you close down your machine?

A. 4:20.

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Q. And then what did you do?

A. We wash it up and everything, before 5:00 o'clock.

Testimony of Carnie Brooks

Q. What time would you be through washing up?

A. Around a quarter to five.

Q. Then what would you do?

A. My job upstairs, I would do a little work upstairs until 5:30, the rest of the fellows would go home.

Q. Did you ever see the rest of the fellows take a shower about a quarter of five?

A. We all did it sometimes.

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Q. Did you ever hear any management supervisor or anyone complain about taking showers at a quarter of five?

A. A couple of years ago we ran into it a lot. Carl Ferst used to give us sand about it.

Q. How many years ago was that?

A. The last time I remember when he stayed on us about it was at least two years ago.

Q. Up until 1951, the time your brother was discharged, was he complaining that you know of about taking showers?

A. No.

Q. The employees were taking showers early at that time?

A. Yes, they were.

Q. Did you attend a company meeting around April that was called in the morning?

A. Yes.

Q. Who was there?

A. Bud Schmidt, you know, in the Company employ.

Q. What time of day was that?

A. That was before working hours, he called it before working, I think.

Q. Was there any previous announcement of that?

A. No, there never was.

Q. What kind of employees was there?

A. The plant employees, not no truck drivers, unless

there was a few of them had to stay in.

. . . . . .

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Cross-examination

Q. (By Mr. Skaggs) What did Mr. Schmidt say at the meeting?

A. Well, I don't remember exacty what he said.

Q. Do you remember what if anything he said?

A. No, I couldn't state now, anything he said.

Q. Do you remember him saying that employees had a right to join the union if they wanted to?

A. Yes, I can recall that, yes. He said we had a right to join the union, and we had a right to be of any demonination of religion, and we could belong to the union if we chose to or not, or we could be whatever we wanted to be political, democratic or republican, it still didn't matter, we would still be employed at Coca Cola.

Q. Nobody threatened you in any way, did they?

A. No, not at the meeting.

Q. Now, when Mr. Ferst talked to you on that occasion on the platform when you were smoking, when you were on your relief, you are permitted to stand out on the platform and smoke when you are on relief, aren't you?

A. Yes.

Q. And he said to you that he was disappointed in you Brooks' boys, and "You aren't going to get anything out of the

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union?"

A. That is right.

. . . . . .

Q. (By Mr. Skaggs) Did he say that you would be fired if you joined the union?

A. No, not at that time.

Q. Did he ever?

A. Yes, downstairs later on in the evening; I told you that.

Q. Is that when he said he was going to have to get rid of all the boys?

A. Yes, all the colored boys.

Q. Now, can you tell me what day that was?

A. That was on a Friday; I don't know the date.

Q. Now, was it after the union meeting or before the union meeting?

A. I wouldn't know.

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Q. Well, had you attended the meeting before or after this occasion that Mr. Ferst made this statement?

A. No, no.

Q. You had not attended a meeting at that time?

A. No.

Q. Now, you were talking about attending this union meeting, and you said you joined the union. Have you paid any dues?

A. No, I haven't.

Q. Have you paid any initiation fee?

A. No, I haven't.

Q. Do you think you have been initiated?

A. Well, I was sworn in.

Q. Sworn in?

A. Well, about the union. They didn't ask us for no dues, but they swore us in.

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Q. (By Mr. Skaggs) This meeting that you attended

of the union, that was just an organizational meeting for Coca Cola employees, was it not?

A. No, not exactly.

Q. Well, I mean Coca Cola employees and Mr. Saier and other representatives of the Union were the only people there?

A. No, they had the brewery workers, Falls Cities, 92, and Fehrs, they were all there.

Q. A number of people?

A. Yes, a number of them.

Q. A total of a hundred or more?

A. Yes, I except so, or more.

Q. Now, you spoke of this oath. Have you ever been given a

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certificate of membership in the Union?

A. No, I haven't been given no certificate, myself.

Q. I say, have they ever given you a certificate?

A. They give me a thing to sign for membership in the union, and I was sworn in.

Q. But have they ever given you a card saying, "Carnie Brooks is a member of Local 20 in good standing"?

A. No.

Q. Have you ever been approved to membership by a vote of the majority of the members of the union?

* * * * * * *

A. Yes, they seemed to accept us.

Q. What do you men "seemed"?

A. Well, they was all for us, all of them was for us.

Q. Did they have a vote?

A. I don't remember whether they had a vote or not.

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Q. (By Mr. Skaggs) Now you say Mr. Ferst, when he came down the basement into the locker room, that day, and all you boys were in there, you said that Mr. Ferst said that Mr. Schmidt had been riding him about the colored boys down there and that within two months they would all go, is that right?

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A. He said in two months' time Bud Schmidt told him to get

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rid of us, that he was riding his neck; they was going to get new machines.

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Q. He didn't even mention the union?

299

A. He jumped on us about the union coming in the plant, that started it off.

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300

Q. Were you passing cards out, too, Carnie?

A. I did.

Q. How many people did you give them to?

A. I don't know exactly.

Q. Well, about how many?

A. Well, see, it is like I give them to a couple of guys and then they went on and distributed them around.

Q. How many cards did you have?

301

A. I don't know exactly.

Q. Well, did you get a card back signed from every colored employee?

A. I got a few, but I didn't collect them all.

Q. Where did you get them all that you collected?

. . . . . .

A. In the plant.

. . . . . .

A. In the basement.

Q. What time?

A. I don't know the particular time.

Q. Any particular time that you remember ever getting one?

A. They would just pass them along during the day.

Q. While they were working?

A. Sometimes.

. . . . . .

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Q. (By Mr. Skaggs) I said, didn't the union tell you not to solicit membership on Company time and pass these cards around?

A. I don't remember.

. . . . . .

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RICHARD DAVIS, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) Mr. Davis, what is your name?

A. Richard Davis; 1123 South 12th.

Q. Where are you employed, Mr. Davis?

A. What?

Q. Where do you work?

A. Coca Cola Bottling Company.

Q. How long have you been working there?

A. Close to six years now.

Q. And did you join the union?

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A. I did.

Q. About when?

A. I believe it was in May.

Q. May of this past year?

A. Yes.

Trial Examiner Ferguson: You mean in 1951?

A. 1951.

Q. (By Mr. Kimmell) Now, do you recall sometime after you joined the union, having a conversation with Mr. Ferst and Mr. Schmidt?

A. No.

Q. Well, didn't you come in one day and your time card wasn't there?

. . . . . .

A. That was before I joined the union.

Q. (By Mr. Kimmell) Before you joined the union?

A. Yes.

Q. Tell us about that conversation.

A. I come in one morning and my card was pulled.

. . . . . .

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A. I came to work one morning, and my card was pulled, and I went to find out what it was about, where it was at, or something, so I went downstairs in the dressing room, and the foreman down there come and told me that Mr. Ferst and Mr. Schmidt wanted to see me in his office, so I went in to Mr. Ferst's office and he asked me how long I had been here. I told him a little over five years, and he

said, "We have been mighty nice to you," and I said, "You have," and he said, "Well; just wait a minute." A few minutes later we went into Mr. Schmidt's office, and I sat down. Then he said they had heard that I was involved in trying to organize a union. I told him I wasn't involved in organizing no union. And, he asked me different questions concerning a union card.

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Q. (By Mr. Kimmell) Is that all you can remember?

A. I believe so.

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Trial Examiner Ferguson:

The witness was shown a written statement by the General Counsel. The witness stated that he had signed that statement, and that same was read to him before he signed it. General Counsel showed the witness the statement for the purpose of refreshing his memory, and asked the witness to read the statement for that purpose; whereupon, the witness stated he couldn't read. I then permitted the General Counsel, in the presence of the attorney for the Respondent, to read the statement to the witness for the sole purpose of refreshing his memory.

You may now proceed.

Mr. Kimmell: Can the General Counsel add that the statement was read to the witness and in the presence of Respondent

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Counsel.

Trial Examiner Ferguson: In the presence and hearing of Respondent's Counsel.

. . . . . .

312-A

Q. (By Mr. Kimmell) Now, Mr. Davis, do you know anything else about your conversation with Mr. Ferst and Mr. Schmidt?

A. Well, after he asked me about those cards I told him I didn't know nothing about it. He said, "Well, your name is mentioned."

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Q. (By Mr. Kimmell) Mr. Davis, state who "he" is?

A. Mr. Ferst said, "Your name was told to us that you was the leader of the boys downstairs in organizing the Union." I said, "Well, who told you?" He says, "Well, we are not going to tell you, but we have one of the cards and you and Harold Mose was passing them out." Then Mr. Ferst says, "I think that we have one of the best places around here for working. Doctor Pepper and quite a few other soft drink companies don't have colored working there. And we have more colored here than any other soft drink company in the city." And then he marked my card up and Mr. Schmidt, he dismissed me from his office, told me to go back to work.

Q. Was anything said at this meeting about you being fired?

A. I asked him was I fired, and he told me no, that I wasn't fired; that "We just only wanted to get you in here to talk to you," after he heard I was involved in the Union. Well, I asked him why did he pick me out of 150 or 170 people to talk to me about the Union, I didn't know anything about. He says,

312-B

"Well, your name was mentioned."

Q. And was anything said about where you previously worked?

A. He asked me where did I work at before I came here. I told him Klara Provision Packing Company. He first asked me why did I leave. I told him I worked in blood all the time and I didn't like my work. He asked me why didn't I go back, and I told him I didn't like the job. He says, "Why did you come out here and start something?" and I said "I haven't started anything." I says, "The way it sounds to me everybody out here seems to want a Union, even from the truck drivers on clean through the plant." And Mr. Schmidt said, "Well, we heard about the truck drivers, but we didn't know anything about the boys down stairs in the basement."

Q. Now, did you ever talk to Mr. Ferst again?

A. Yes, about a week or two later, he caught me, he approached me at the east end of the garage where I was standing there smoking, and said, "You are one of the leaders," and I said, "Leader of what?" And he says, "You know what I am talking about," and he walked away from me.

Q. Did you know what he was talking about?

A. No, I didn't know, at that time I didn't.

Q. When did you find out?

A. Well, about two weeks later he approached me again upstairs, and asked me, "Why don't you go on back down to Klara's?" and I asked him, I said, well, I asked him, "Have I done

anything?" He said, "No, I just want you to go back down there." I said, "Well, you give me my money and I will go back down there." And he didn't say anything, he just turned his back and walked on away.

Q. When did you find out he was talking about the Union?

be approximately three months, more or less, from the time of that conference until the time you signed the statement.

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Q. Now, I will ask you, when Mr. Ferst and Mr. Schmidt talked to you, if they didn't say in substance, that what they were interested in talking with you about, was, to determine what complaints, if any, the employees had concerning the Company, that is, what the employees wanted, I believe is the way you put it? Isn't that what they said, in substance?

A. Yes.

Q. And didn't you volunteer, that is, didn't you of your own accord, speak up and say that you were not interested in a union and had nothing to do with it?

A. I didn't have nothing to do with organizing no union.

Q. But didn't you speak up and say that right there?

A. That is right.

Q. And Mr. Schmidt and Mr. Ferst were talking to you in an attempt to find out what the source of any dissatisfaction might be, of employees of the Company, is that right?

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Q. (By Mr. Glenn) And you spoke up and told them that you were not a member of the union, when they asked you that, isn't that right?

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Q. You weren't docked for any time or anything of that sort?

A. No.

A. Well, I took it for granted that he was talking about the Union at the same time, just before that, he had me in his office, the time he had me in his office, because he approached me both times after I—a few weeks later, after I had been in his office.

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TRANSCRIPT OF TESTIMONY

December 19, 1951

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Cross-examination

Q. (By Mr. Glenn) Mr. Davis, did you say you attended the first organizational meeting of the union?

A. No.

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Q. Did you attend a meeting?

A. Yes, sir.

Q. Which one? About what time was it? About what date was it?

A. I don't remember the date.

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Q. Now you said you had a conversation with Mr. Schmidt and Mr. Ferst, and that someone had pulled your card, and you went in to see Mr. Ferst about it, and at about that time, you had a conversation with Mr. Ferst and Mr. Schmidt. About when was that?

A. I don't know exactly when it was.

Q. Can you tell me what month it was?

A. I think it was April, but I am not sure—May, but I am not sure.

Q. Was it April or May?

A. I think it was May. I couldn't say definitely what month it was.

Q. 1951?

A. That is right.

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A. Well, first he asked me what the boys downstairs wanted. I told him they wanted more paid holidays, better working conditions and more money on the hour, and then he said, "We

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are giving you three paid holidays, three paid holidays." He said, "We are giving you three paid holidays, and nice locker rooms, and everything."

Q. Did Mr. Schmidt or Mr. Ferst ask you if you belonged to the union?

A. No.

Q. Did you pass out any union cards?

A. No.

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Q. (By Mr. Glenn) Now, who prepared that document?

A. I don't remember his name.

Q. Did he represent himself to be a representative of the National Labor Relations Board?

A. No, I think he said he was a government man, government official, I believe.

Q. Does the name Joseph G. Smolen sound familiar to you?

A. Well, I don't remember any names.

Q. Where did you execute that document?

A. Third and Jefferson, I believe.

Q. Well, what is at Third and Jefferson? Is that somebody's office?

A. It is a building there.

Q. What is that?

A. It is a building, I don't know the name of that building.

Q. Well, whose office were you in?

A. I didn't notice that.

Q. Well, how did you happen to do down there?

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A. I went with two or three others, boys from the plant.

Q. Who were the other boys that went down there with you?

Mr. Kimmell: May I interrupt? Mr. Trial Examiner, may we be off the record?

Trial Examiner Ferguson: Yes, off the record.

(Discussion off the record.)

Trial Examiner Ferguson: On the record.

Q. (By Mr. Glenn) Who were these fellows that went down there with you?

A. Carnie Brooks and Frank McCoy.

Q. Anybody else go down there with you?

A. No.

Q. Who asked you to go down there?

A. I believe it was Frank McCoy.

Q. Did I understand you to say you can't read writing in ink, only Braille?

A. That is right.

Q. Is that right?

A. That is right.

Q. Then you can't look on this sheet and tell whether that is your signature or not, can you?

A. I don't read small print.

Q. Well, can you look on this and tell if this is your signature?

A. Yes.

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Q. Did you say this is your signature on this document?

A. Yes.

Q. You are sure about that?

A. Yes.

Q. Who was down at the office when you got down there?

A. Mr. Saier, and this government man.

Q. Anybody else? Was anybody else there?

A. And another fellow.

Q. Do you know who he was?

A. I don't remember his name now.

Q. Well, did he work out at the plant?

A. Well, he used to, but he left. He didn't stay long. He was there when I got there.

Q. Was it Delmar Hoagland?

A. No, it was a fellow named Walter Bailey, a colored fellow.

Q. Walter Bailey?

A. Yes.

Q. Now, was that Mr. Saier's office you were in?

A. I believe it was.

Q. That is Mr. Saier, the Business Agent of the Union?

A. Yes.

Q. Now, did anybody ask you any questions?

A. When I went in the office?

Q. Yes.

A. No, not right then.

Q. Nobody asked you any questions?

A. Not then.

Q. Well, what happened then when you went in his office?

A. I went in and a fellow typed that document out.

Q. You mean a government man typed the document out?

A. Yes.

Q. Did you talk to him before he typed it out?

A. No, he went into the office and he typed it out as I talked.

Q. He typed it out as you talked?

A. Yes.

Q. Now, how long did you stay down there?

A. I don't know exactly.

Q. Well, I am not asking you exactly, but approximately how long? An hour?

A. It was about an hour, maybe an hour and a half, something like that.

Q. Did you sign it while you were there, or did you come back and sign it?

A. I signed it while I was there.

Q. Did Mr. Saier ask you any questions, or talk to you, while you were preparing the statement?

A. Repeat your question again.

Q. Did Mr. Saier ask you any questions and talk to you, while you were preparing the statement?

A. No.

Q. Did Carnie Brooks talk with you?

A. No.

Q. Now that statement was executed by you more than three months after the conversation you said you had with Mr. Schmidt and Mr. Ferst, wasn't it?

A. Yes. I don't remember the date; I don't know how long it was.

Q. Well, it was stipulated here awhile ago that this statement was executed in August, on the second day of August, 1951, and your said you had your conversation with those gentlemen about sometime in May, 1951, so it would

Mr. Glenn: No further questions.

Trial Examiner Ferguson: That's all, Mr. Davis.

(Witness excused.)

ROBERT CLIFFORD YEAGER, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) State your name and address, please.

A. Robert Clifford Yeager, 2410 Montgomery.

Q. Louisville?

A. Louisville.

Q. Where are you employed?

A. Coca Cola Bottling Company.

Q. How long have you been working there?

A. Thirty-five years.

Q. What is your job?

A. Delivery salesman.

Q. Who is your route supervisor?

A. Irwin Hartmann.

Mr. Kimmell: I believe we stipulated as to him.

Mr. Skaggs: We did.

Q. (By Mr. Kimmell) Now, do you recall sometime around May,

May 1st, having a conversation with Mr. Hartmann?

A. Yes, sir.

Q. What was that about?

A. Well, he asked me, brought a paper up, I was checking up, and he brought a paper up there and asked me to see if any of the boys would care to sign it.

Q. What was on the paper, the best you can recall?

A. Well, I don't exactly remember it all, but it was something about, "We, the undersigned, do not want a labor organization," or something like that. Now, I don't remember all of that.

Q. Mr. Hartmann gave you this paper?

A. Yes.

Q. Did he tell you what to do with this paper?

A. He asked me to see if any of the boys cared to sign it.

Q. What did you do with the paper?

A. I asked about three of the boys and they said they didn't care to sign it, so I left it with the checker as I went out the next morning, to give it to Mr. Hartmann.

Q. Who—what boys did you ask?

A. Atwell Altsman, and Joe Parrish, and Tom Aikins.

Q. And they didn't want to sign it?

A. No, sir.

Q. Did you sign it?

A. No, sir.

Q. Did you ever lk to Mr.—I mean, did Mr. Miller ever

talk to you again about this paper?

A. Well, the next day he asked me if I got any signers, and I said, "No, the boys didn't want to sign", and he said, "Well, don't worry about it, they may be scared they will get themselves in trouble," and that was all of it.

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Cross-examination

Q. (By Mr. Glenn) Who said that?

A. Mr. Miller.

Q. Mr. Will Miller?

A. Yes.

Q. Now, do you have that paper with you that you are talking about?

Q. You mean that paper to have the boys sign?

Q. Yes.

A. No, sir.

Q. What did you do with it?

A. I turned that back in, and I gave that to Fred Kronauer, as I went out the next morning, and I told him to give it back to Hartmann.

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Q. (By Mr. Glenn) Now, when you had the conversation with Mr. Miller, or told him that the fellows didn't want to sign it, was Mr. Miller angry?

A. No, sir, no.

* * * * * * * * *

Q. What was it exactly that he said?

A. He just asked me, he said, he said something about, "I believe you didn't get any signers," and I said, "No, the boys are kind of scared to sign it, or don't want to sign it, and I just turned it back in," and he said, "Don't worry about it, some of the boys are probably afraid they will get themselves in trouble it they sign it." That was all of it.

* * * * * * * * *

Q. And when Mr. Hartmann handed you the paper, do you happen

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to recall to whom the paper was addressed?

A. It wasn't addressed to nobody.

Q. Was it addressed to the union, or was it addressed to the National Labor Relations Board, or do you recall

who it was addressed to?

A. I don't think so.

Q. What did it say?

A. About, "We the undersigned, do not want a labor organization," I think, something like that. I don't remember all of that, it's been so long.

Q. Now, of course, Mr. Hartmann just didn't hand it to you and say, "Get it signed." You had to talk with him, I suppose, at the time he handed it to you?

A. I was checking up, and he handed it to me, and asked me to see if any of the boys would care to sign it, and I had to get checked up, and he had to leave then.

Q. Do you recall him saying that some of the fellows had made inquiries to the Company as to how they could withdraw after they had signed the cards and that if they wanted to do so, they would sign this piece of paper?

A. No, he didn't say nothing to me about that.

* * * * * * * *

A. He just asked me to see if some of the boys would care to sign it.

Q. See if some of them cared to sign it?

A. Yes.

Q. And did he tell you to put any pressure on them?

A. No, sir.

Q. Did he tell you to tell any of the fellows that if they didn't sign it they were going to lose their jobs?

A. No, sir.

Q. Did he tell you they were going to be laid off, or did he make any threats, or did he tell you to put any pressure on the people?

A. No, sir.

Q. In other words, it was left on a purely voluntary basis?

A. Yes, that is right.

Q. Did he tell you to offer the persons anything who would sign it?

A. No, sir.

Q. Either money or increased pay or overtime?

A. No, sir.

Q. And did he offer you anything?

A. No, sir.

Q. To get signatures?

A. No, sir.

Q. Now, you have been working there 35 years?

A. Yes, sir.

Q. You are still working there?

A. Yes, sir.

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Q. And even though you turned it back in, the Company, through Mr. Miller, or Mr. Schmidt, or anybody else, has never threatened you, or undertaken to fire you, or to discipline you in any manner?

A. No, sir.

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GEORGE MIALBACK, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) State your name and address, please.

A. George Mialback, 1825 Kentucky Street.

Trial Examiner Ferguson: How old are you, Mr. Mialback?

A. 24.

Q. (By Mr. Kimmell) Mr. Mialback, did you ever work for the Coca Cola Company of Louisville?

A. Yes, sir.

Q. When did you start work there?

A. I worked there twice, the first time was in '45, I believe it was.

Q. How long did you work then?

A. Oh, about three months, I believe it was, and then I quit and went in the Service.

Q. Did you ever work there again?

A. Yes, sir.

Q. When was that?

A. I believe it was around August of 1950.

Q. And how long did you work?

A. Oh, until around May, something like that, around nine months.

Q. And what happened in May, did you resign?

A. Yes, sir.

* * * * * * * *

Q. What was your job at Coca Cola the second time you went to work there?

A. A route salesman.

Q. Now sometime in the month of April or May of 1951, did you ever have occasion to hear anything about a union in the plant?

A. Yes, sir, I did.

Q. Now, when was the first you heard about the union?

A. It was in May sometime, around the 25th, something like that.

Q. May 25th?

A. Something like that. It was in the middle of May or something like that; I don't know the exact date; it's

been so long ago.

Q. Sometime in April or May, then?

A. Yes, sir, around that time.

Q. What was the first you heard about it? Who told you first about it?

A. Delmar Hoagland.

Q. What did he tell you about it?

A. Him and a fellow that was with him said they was going

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to try to organize Coca Cola, and asked if I would help, and I said yes.

Q. Did you ever attend a union meeting?

A. Yes, sir.

Q. What happened at this union meeting?

A. Well, at this union meeting, we just were talking about, we was trying to figure a way how to organize Coca Cola, and the ones at the meeting that night joined the union, and, well, more or less tried to get more members in the union, that was the whole idea, was try to get more members.

Q. Do you recall what date this union meeting was?

A. No, sir, I don't.

Q. Was it April 25th?

A. It might have been something like that. I know there was a 25th in there somewhere, I don't remember what—

Q. Now, do you remember the day you went to this union meeting, whether there was a Company meeting that day?

A. That afternoon, before the meeting, there was.

Q. A Company meeting?

A. Yes, a Company meeting was called.

Q. What time of day was this Company meeting?

A. Oh, about 4:00 o'clock.

Q. And how did you hear about this Company meeting?

A. Well, it was a bulletin, they put a notice on the bulletin board that there would be a meeting.

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Q. When did they put that notice on?

A. Oh, I imagine around 3:30 that afternoon.

Q. Had there ever been any Company meetings before?

A. Oh, yes, we had had Company meetings quite often.

Q. Was there any practice as to how much notice was given for them?

A. Well, they would give you maybe a day or two notice. There would be a meeting, and they would give you a day or two, or maybe a week notice, sometimes.

Q. Do you ever remember a meeting that was on such short notice as this one?

A. No, sir, I don't.

Q. What occurred at this meeting?

A. Well, they had talked about different things, I don't know all they talked about, but I know they mentioned a union, right before the meeting broke up, they mentioned the union.

Q. Who mentioned the union right before the meeting broke up?

A. Mr. Schmidt.

Q. Did Mr. Carl Ferst say anything?

A. Well, yes, he kind of got in and was in an uproar, and called out a few names of the employees there and asked them what was their gripe.

Q. Was Delmar Hoagland one of the names called out?

A. He called Delmar, he didn't say Hoagland, he just called

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Delmar.

Q. Was there anybody else called Delmar there?

A. No, sir, that is the only one.

Q. Now, do you recall whether, sometime after this, you had a personal conversation with Will Miller?

A. Yes, sir, it was just after I cashed up one day, I was getting ready to punch the clock.

Q. How long after this union and Company meeting was this?

A. I guess a couple of weeks.

Q. What happened?

A. Well, he asked me to step in his office, he wanted to talk to me, and he had a kind of grin on his face, and I didn't have any idea what he was going to talk about, so he wanted to ask me about this union meeting.

Q. Just try to say what he said and what you said.

A. He said, "I heard that you have been going around trying to talk men into joining the union," and I said, "Well—" and I kind of grinned, and he said, "I don't care what you do on your own time and when you are not on Company time." He said he didn't want to hear about me talking to any men and getting men off during working hours.

Q. Did he say anything about you attending the union meetings?

A. Well, he asked me if I attended meetings, and I said I just went up there to find out what was going on, and he told me, "None of the ones that you think are on your side are not

exactly on your side, because they came and told me you are one going around trying to talk them into joining the union."

Q. Did he say who these persons were?

A. No, he didn't give a name.

Testimony of George Mialback

Q. Did he say anything about Frank Kamenish?

A. He told me after one of the meetings, "After you arrived at the meeting, Frank Kamenish came in."

Q. That was a union meeting?

A. A union meeting.

. . . . . .

A. Well, it is all according to the type of weather. In the winter time I would get around 3:30, sometimes 3:00 o'clock, and in the warm weather, I would get in anywhere from 4:00 to 5:00 o'clock.

Q. What time would you finish on a Saturday?

A. That was my lightest day, on a Saturday. I would get in about 2:00 o'clock. See, I had a long way to go on a Saturday. That was my longest route.

Q. How about holidays like July 4th, or Labor Day, what time would you get through then?

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A. Well, see, I had three different routes, some of my routes were long and some of them were short; now, if they would fall on a day my route was long, I would get in a little bit earlier, than I usually do, on account of the places are closed on the 4th of July.

. . . . . .

Cross-examination

Q. (By Mr. Skaggs) Mr. Mialback, you left your employment at Coca Cola to take another job, or I believe perhaps, go

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into business for yourself?

A. That is true.

Q. In your conversation with Mr. Miller, all that he asked you to do, was just not to solicit people for union membership on Company time and while they were work-

ing, is that correct?

A. Yes, sir, he told me not to try to take the mens' minds off their work during working hours, was what he told me.

Q. He told you he didn't care what you did on your own time?

A. On my own time, yes, sir.

Q. He didn't tell you not to join the union, did he?

A. Well, he more or less, I don't guess he could have told me not to join it, I mean, if I really wanted to join it, it would have been up to me if I wanted to or not.

Q. And you knew that, of course?

A. Well, yes, I knew—well—I was kind of leary at the time, to talk it up because the way it was—

Q. In other words, you didn't want to tell your story that you were helping organize the plant, is that correct?

A. Yes, sir, I didn't.

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Q. Then you say Mr. Miller also mentioned something about Kamenish coming in right after you did. Coming in where, to a union meeting?

A. That is what he said, when we was at the labor hall, up here on Market and—Broadway, rather, after that meeting, he

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said Kamenish came in right after I did, to the meeting.

Q. Was there any significance in that to you?

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A. He knew he was at the meeting and he knew he participated at the meeting.

Q. Now, getting back to the Company meeting, it was

held at about 4:00 in the afternoon. At that meeting, Mr. Schmidt told everybody that they could join or not join as they chose, did he not?

A. Yes, he said, he said that, yes, sir.

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Q. And after discussing various things in connection with the sales, at the end of the meeting, Mr. Schmidt mentioned about the union, stating the Company's position was that anybody could belong to it or not belong to it, as he chose.

A. That is correct, yes, sir.

Q. Then Mr. Ferst, you say, spoke up and said, "Delmar, what is your beef," or "What is your complaint?"

A. Well, Carl Ferst got up, he says, "Well, what about you, Delmar; what about you, Austin; what about you George; what is your complaint?" Well, I didn't know if he was talking to me or George Vernon. I was sitting pretty close to George Vernon, and he asked us what about it, what our gripe was.

Q. You didn't say anything?

A. No, sir, I didn't open my mouth.

Q. George Vernon didn't say anything, did he?

A. Not that I know of. His face just got red is all I know.

Q. And that's all Mr. Ferst said, is "What is your gripe?" Is that correct, or, "What is your complaint?"

A. He said, "If you find anything wrong, anything wrong with the Company, let us know," and Mr. Austin got up and said, "Well, when we do come to you with different problems about the routes, you make damn fools out of us." That's what Austin said.

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Trial Examiner Ferguson: What kind of work did he do?

A. He was the same as I was, a route salesman.

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Redirect Examination

Q: (By Mr. Kimmell) Now, directing your attention to this conversation you had with Mr. Miller, when he spoke about the union meeting, what frame of mind did that put you in with respect to union organization?

A. Well, right before that, Delmar Hoagland got fired, and I didn't want to just come right out and say I was a member of the union, I was trying to organize it, because I had just got married myself, at the time, and didn't want to lose my job.

* * * * * * *

Recross-examination

Q. (By Mr. Skaggs) Did Mr. Miller tell you you would lose your job if you belonged to the union?

A. No, sir, he didn't come right out and say it, but you know, Delmar Hoagland lost his, and him and I was at both of

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the union meetings, and he just—I could more or less figure what was going to happen, so I said, "I don't know what is going on, I just go to the meetings to find out."

Q. You don't know why Delmar Hoagland lost his job, do you?

A. Well, I would rather not say. It looks kind of obvious to me.

Q. It is obvious to you?

A. He was an awfully good worker, and he got fired.

Testimony of George Mialback

He come to me one day and said, "I was fired," and I asked him what for, and he just laughed.

Q. Did you ever work with him?

A. Yes, sir, right on the same truck with him.

Q. He was a good worker when you worked with him?

A. Yes, sir, an awfully good worker.

Q. You don't know how many times Mr. Hoagland worked for Coca Cola Company, do you?

A. Well, he told me he worked there once before.

Q. How long ago was it, with reference to the time you quit, that you and Hoagland were on the same truck?

A. Well, let's see, I started there in August, and I guess it must have been around September when we worked together on the truck.

Trial Examiner Ferguson: Now, what year was that?

A. '50, 1950.

Q. (By Mr. Skaggs) And how long a period of time was it?

A. Around a week, because he was taking over a route that I had, and I was going to another route.

Q. Did Mr. Hoagland live on 18th Street in the 1100 block at that time?

A. I never did know where Delmar Hoagland lived at.

Q. Were you ever in his home?

A. No, sir.

Q. Did you ever know Mr. Hoagland before you came to work at Coca Cola?

A. No, sir, he came to work about a day after I did, I believe. That is when I first met Delmar.

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Testimony of Jim Lueke

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JIM LUEKE, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) State your name and address, please.

A. Jim Lueke, 3149 West Broadway.

Q. What is your first name?

A. Jim; James.

Q. Where are you employed, Mr. Lueke?

A. Coca Cola.

Q. And what is your job?

A. Route salesman.

Q. And how long have you been working there?

A. About a year and two months.

Q. And you are presently employed?

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A. Yes.

Q. And you are appearing here in response to a subpoena?

A. Yes.

Q. Who is your route supervisor?

A. Carl Bunning.

Q. Carl Bunning, Sr.?

A. Yes, sir.

Q. What is the name of the route that you have?

A. West Central 2.

Q. Do you remember an employee named Frank Kamenish?

A. Yes.

Q. Did he work for the Company?

A. Yes, sir.

Q. What route did he have?

A. West Central 3.

Q. Is that in any way adjacent to or close to your route?

A. Yes, it is right next to mine.

Q. The next route to yours?

A. Yes, sir.

Q. How did the size of Kamenish's route compare with yours?

A. Well, they are about the same size. I think he sold just a little bit more than I did.

Q. Now, from the time you worked there, did you observe any customs, had the drivers observed any custom of coming in early on holidays?

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A. Well, yes, we mostly stocked up our dealers the day before, so we could get in early that day.

Q. Is that—was that true of Derby Day?

A. Yes.

Q. What time do you recall getting in on Derby Day?

A. Between 10:00 and 12:00.

Q. Between 10:00 and 12:00?

A. It must have been about 11:00 or 11:30, maybe.

Q. Do you remember seeing Kamenish that day?

A. Yes, I met him when I come up to cash up.

Q. And did you have a conversation with him?

A. Yes.

Q. What did he say and what did you say?

A. He simply said he just left the office and had got canned.

* * * * * * *

Q. And did you ever attend a union meeting?

A. Yes.

Q. About when?

A. I don't remember the exact date. It was the first meeting they had.

Q. Was that April 25th?

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A. Yes, I guess so.

Q. How did you hear about this union meeting?

A. Well, I think Kamenish told me about it.

Q. Did you ever sign a union card?

A. Yes.

Q. Who gave you the card to sign?

A. I guess it was Karl Saier.

Q. But Kamenish told you about the union meetings?

A. Yes.

Q. Now, after you attended this union meeting, did you ever have a conversation with your supervisor, Mr. Bunning?

* * * * * * * *

A. Well, yes, he met me one day on the route and asked me if I had attended that meeting.

Q. He asked you whether you had attended that union meeting?

A. Yes.

Q. What did you say?

A. I told him yes.

Q. Did he say anything else?

A. No, we were talking over things in general.

Q. Did he ask you whether you had attended the union meeting?

A. Yes.

Q. Now, were you supposed to wear a kind of uniform when you worked for the Company?

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A. Yes, supposed to wear a Company uniform.

Q. Did you ever see any employees wearing baseball

hats instead of regular hats?

A. Frank Kamenish and another boy, Bob somebody, I don't recall his last name.

Q. Both these employees used to wear baseball hats?

A. Yes.

Q. Do you remember when Frank Kamenish wore a baseball hat?

A. I don't remember when, I know he did wear one; I could not tell you exactly when.

Q. Do you remember how long he wore it?

A. Oh, about a month I guess, I don't know.

Q. And did he wear any other kind of hat after that?

A. Well, I noticed he had on a Coca-Cola hat after Mr. Miller said something to him about the hat.

Q. How do you get your Coca Cola hats, where do you get it?

A. Well, I got mine, there was a man came down there, we gave him an order for the hat, for the whole uniform.

* * * * * * * *

Q. Well, did you pay for the uniforms?

A. Yes, I paid, I think half of them we paid, or something, half of the whole total price.

Q. And who pays the other half?

A. The Company.

Q. And how many routes have you had since you have been on the job?

A. Just one. Well, I took out another man's route, Morris Allen's route, when he was off about a month, I had his route.

Q. Did you ever see any practice in the plant for drivers to bid on routes?

A. Yes.

Q. Is that done often?

A. Whenever there was a route open, someone quit or something.

Q. What would happen when there was a route open?

A. Well, there was a notice put up on the blackboard that such a route was open.

Q. Who would put it up, the Company?

A. Yes.

Q. And then what would the drivers do?

A. Well, they would put their bids in, send them in to the office.

Q. Why did drivers try to get another route?

A. To make more money, I guess.

Q. A sort of promotion?

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A. Yes.

Trial Examiner Ferguson: Well, some routes are better than others, aren't they?

A. Sure.

Trial Examiner Ferguson: Pay more, don't they?

A. Yes.

Q. (By Mr. Kimmell) Now on Derby Day, when you got in, did you see anybody else in, outside of Frank Kamenish?

A. Yes, there were other drivers, I couldn't say any names of them.

Q. Do you remember how many? Just approximately?

A. A few, approximately four or five, maybe, I don't know, if that's all, if others were in early, they probably had already gone home.

Q. In other words, it is pretty usual to come in that early on Derby Day?

A. Yes.

Q. How is the traffic in Louisville on Derby Day?

A. Well, it is pretty thick. Plenty of traffic, in my

district, anyway.

Q. Your district was right there, wasn't it? Near Frank's?

A. Yes, up towards uptown, anyway, it was.

Q. And you tried to get off the street as soon as you can on that day?

A. Yes.

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Q. Do you remember ever discussing with Frank a certain stop on either your route or his route, called the Stop and Shop Market?

* * * * * * *

* * * Isn't it true, to try to refresh your memory, there was a stop, right between the two routes, and there was a question as to who had it?

A. Oh, yes, there was one on 18th Street. I don't know the name of the place. It was a little grocery store.

Q. What was that all about?

A. Well, a stop was there, and nobody had it, neither me or Kamenish, and then Bunning asked me about it, for me to make the stop, it was on my route; but, I knew it wasn't on my route, but I went on and made it; then he came back later and apologized and said it wasn't on my route.

Q. Did he say whose route it was on?

A. Kamenish's.

* * * * * * *

Cross-examination

Q. (By Mr. Skaggs) How many Derby Days have you been with the Company?

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A. One.

Q. How many times did you see Kamenish without his

full uniform on?

A. Oh, I couldn't say how many times. The only thing that wasn't a full uniform, was the baseball cap he wore; very seldom.

Q. He sort of started a fad of the boys wearing baseball caps down there, didn't he?

A. No.

Q. When you met Kamenish and he told you he got canned, that's all he said, "I just got canned?" is that what he said?

A. I asked him why and he said he didn't know.

Q. He didn't tell you he had quit, did he?

A. No.

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Q. Now, do you know what date Mr. Bunning ran into ~~you~~ on your route and asked you if you had attended the union meeting?

A. It was on a Saturday, I don't know what date, a couple of weeks or so after the first meeting.

Q. A couple of weeks or so after the meeting which you had attended, is that correct?

A. Yes.

Q. And you say he talked about general things, about various things, and then asked you if you—

A. Well, he asked me if I signed a union card, and I told him yes, and then he asked me did I go to the meetings, and I told him yes.

Q. That was all of your conversation that related to the union?

A. Well, he asked me if I thought that was the right thing to do, and I more or less didn't pay much attention, and talked about something else.

Q. Well, he didn't tell you that you would be better off if you get out of the union, or anything, did he?

A. Yes, he did try to tell me that—he didn't think it was right himself, he didn't think that I should think that way.

Q. But he didn't tell you that you would get fired if you continued to belong to the union, did he?

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A. No.

Q. He didn't promise you anything if you got out of the union, did he?

A. No.

Q. Did anybody ever mention the union to you, any Company man, at all?

A. No.

Q. Such as Mr. Bunning, except on that one occasion?

A. That's the only time.

Q. And that you think was—can you tell me whether it was before or after the Derby?

A. It was before the Derby.

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Redirect Examination

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Q. (By Mr. Kimmell) All right, Mr. Lueke, do you remember how long before Mr. Kamenish was terminated that is, whether he was fired or quit, that he stopped wearing this baseball hat?

A. I couldn't tell you exactly how long. I know it was pretty cold when he was wearing the hat, and I imagine, oh, probably about February when he was told about the hat.

Testimony of Jim Lucke

Q. At the time he was told about wearing the hat, it was cold?

A. Yes.

Q. Was that around the time of the big snow?

A. No, I think it was along about February or someplace right in there.

Q. That was the time he was wearing the baseball hat?

A. I think so.

Q. Do you remember that big snow last year?

A. Yes.

Q. Did you have any trouble getting stuck or anything like

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that?

A. Yes, I got stuck a few times, but I borrowed a shovel and shovelled my way out.

Q. But you got stuck a few times?

A. Yes.

Q. It was a pretty big snow?

A. Yes.

Q. And was it piled up pretty high next to the curb?

A. Yes.

* * * * * * * *

JOSEPH P. PARRISH, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) State your name and address, please.

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A. Joseph Parrish, 2515 Standard Avenue.

Q. Is that in Louisville

A. Louisville, Kentucky.

Q. Where are you employed, Mr. Parrish?

A. Coca Cola Company.

Q. How long have you been working there?

A. Three years this coming March.

Q. Are you still working there?

A. Right.

Q. And you are appearing here today in response to a subpoena?

A. A subpoena, yes, sir.

Q. What is your job, with the Company?

A. Route salesman.

Q. Who is your route supervisor?

A. Well, Will Marty.

Mr. Kimmell: Will the Company stipulate to the same facts stipulated with respect to the other route supervisors, that they will also apply to William Marty?

Mr. Skaggs: Yes. You, of course, are referring to Mr. Sheehan, Mr. Bunning and Mr. Hartmann?

Mr. Kimmell: Yes, I am.

Q. (By Mr. Kimmell) Now, did you ever hear about a union organizational campaign in the plant?

A. I did.

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Q. About when was that?

A. About the first week in May, or the middle of May, 1951.

Q. Now, who told you about the union?

A. Well, I heard a lot of—all I heard was a lot of talk about organizing a union and of union meetings, and I knew by the talk where they were and what time.

Q. Did Delmar Hoagland ever talk to you about the union?

A. No.

Q. Did he ever ask you to sign a union card?

A. No.

Q. Where did you sign your card?

A. At the union hall.

Q. Do you remember when the first union meeting was?

A. About the middle of May. I couldn't tell you the exact date.

* * * * * * *

Q. You don't remember a conversation—how about with Mr. Hartmann?

A. Yes, I did.

Q. Now, when was this conversation?

A. Right after the union meeting, Mr. Hartmann asked me if

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I attended the union meeting and I said I did.

Q. Who else was present?

A. Well, there was Tommy Aikens—and I can't remember anybody, any of the others.

* * * * * * *

Q. Did he ask you whether you signed a card?

A. Yes, sir, he asked me did I sign a card and I said I did.

* * * * * * *

Q. Now, sometime after that, did Mr. Robert Yeager approach you with a paper?

A. Yes, I was in a group with other drivers, and he approached us and asked us that he was asked for the boys to sign, to read this and then sign it.

Q. Do you remember what the paper said?

* * * * * * *

A. "This is a petition against representation of the

CIO Brewery Union;" something in that order.

Q. Did you sign that?

A. No, I didn't, I said that I didn't have time.

Q. Did Yeager tell you where he had gotten this petition?

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A. No, he didn't.

Q. During the years that you have worked for the Coca Cola Company, was there any custom as to what time you came in on holidays?

A. Whenever your route was completely finished, you had all stops covered completely, usually you made them, the ones that you figured wouldn't be open on holidays, you would make them the day before so you could have them stocked in good order.

Q. Did you usually get in earlier on holidays?

A. Well, I didn't, because I was on a country route, I didn't get in too early, no.

* * * * * * * *

Q. Do you know what time the other drivers got in?

A. Not all, no, sir.

Q. How about those who were in the city?

A. There were some still out when I come in from Seymour, but there were a lot of them in.

Mr. Kimmell: That's all, Mr. Parrish.

* * * * * * * *

Trial Examiner Ferguson: How old are you?

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A. 25.

* * * * * * * *

Cross-examination

Q. Where were you when you had this conversation with Mr. Hartmann?

A. In the locker room.

Q. In the locker room?

A. That's right.

Q. And he asked you if you attended a union meeting?

A. Yes, sir.

Q. And had signed a card?

A. That's right.

Q. You told him you had?

A. Right.

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Q. And that was all that was said?

A. In regards to that, yes.

Q. I take it then you probably talked about some other subject?

A. Well, we carried on a little conversation later, but it wasn't—

Q. Didn't have anything to do with the union?

A. Not the union, just working conditions at the Company and that was all.

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THOMAS C. AIKINS, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) Your name and address?

A. Thomas C. Aikins, 2515 Standard Avenue, Louisville, Kentucky.

Trial Examiner Ferguson: How old are you, Mr. Aikins?

A. 20.

Testimony of Thomas C. Aikins

Q. (By Mr. Kimmell) Where are you employed, Mr. Aikins?

A. Coca Cola Bottling Company, Louisville, Kentucky.

Q. How long have you been working there?

A. About a year and a half.

* * * * * * *

Q. Are you working there now?

A. I am working there now, yes.

Q. Are you appearing here in response to a subpoena? Was there a subpoena issued upon you?

A. Yes, I got a subpoena.

Q. What is your job?

A. I am a route salesman.

Q. And who is your supervisor on that?

A. Everett Hartmann.

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Q. Now, did you ever hear anything about a union organizational campaign in the plant last Spring?

A. Yes.

Q. About when was that?

A. About May.

Q. About May of 1951?

A. May of 1951.

Q. How did you hear about it?

A. I was approached by Hoagland one day and asked if I wanted to join the union.

Q. What did you say?

A. I said I would consider the matter.

* * * * * * *

Q. Did you attend a union meeting?

A. Yes.

Q. Did you sign a card?

A. Yes.

Q. Now, before you went to this union meeting, did you ever talk to Mr. Miller?

A. Yes.

Q. What was that about?

A. Well, he just asked me if I was going to the union

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meeting that night.

* * * * * * * *

Q. Did you ever talk to Hartmann?

A. Yes, I talked to Hartmann.

Q. When was that?

A. That was when the union, I think, was first being organized.

Q. What did Mr. Hartmann say?

A. He asked me if I signed a union card.

Q. Who else was there?

A. Joe Parrish.

Q. Did he ask you anything else?

A. No.

Q. Did he ask you whether you had gone to the union meeting?

A. Yes.

Q. What did he—what did you say?

A. Yes, I told him I went to the union meeting.

Q. And what did you say when he asked you if you had signed a card?

A. I told him no.

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Q. (By Mr. Kimmell) Now, do you remember ever being approached by a driver called Yeager, with a piece of paper in his hand?

A. Yes.

Q. About when was that?

A. I don't remember exactly when that was.

Q. Was it after the union meeting?

A. Yes.

Q. Now, do you remember what the paper said?

A. It said something, words to this effect, it said, "We the undersigned, do not want this union at this time," or something like that.

Q. What did Yeager say, if anything, when he showed you this paper?

A. He just asked me if I wanted to sign the paper.

Q. Did you sign it?

A. No.

Q. Was anybody else there when Yeager came around with the paper?

A. Yes.

Q. Who else?

A. Joe Parrish and Atwell Austin.

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Cross-examination

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Q. Who did you say was present when Yeager handed you the paper?

A. Austin and Joe Parrish.

Q. Are they supervisors?

A. No, sir.

Q. Are they route salesmen?

A. Yes, sir.

Q. Now you say Mr. Hartmann asked you if you signed a union card?

A. Yes, sir.

Q. And did he say anything else to you at that time?

A. No, sir.

Q. Did he say anything to you about the working conditions

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at the plant?

A. Yes, sir.

Q. What did he say?

A. I don't remember that.

Q. Did he ask you if there was any particular thing that you or the other employees were dissatisfied with at the plant?

A. Yes, sir.

Q. And what did you tell him?

A. What?

Q. What did you say?

A. I told him—I don't remember just what I did tell him.

Q. Well, then, did he discuss working conditions with you, generally?

A. Yes.

Q. Did he point out the pay, the present pay?

A. Yes.

Q. The hours?

A. Yes.

Q. Pensions?

A. Yes.

Q. Hospitalization and so on?

A. Yes.

. . . . . .

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Q. You didn't tell him that you knew of any complaints as to hours, wages and working conditions at that time?

A. No.

* * * * * * * *

Q. Did Mr. Hartmann or Mr. Schmidt or any other supervisor tell you that you would be fired for joining the union?

A. No.

Q. Nor that you would be laid off or disciplined in any manner?

A. No.

Q. And you weren't fired or laid off?

A. No.

Q. And did they at any time promise you anything in the way of money or better wages or privileges or overtime if you would not join the union?

A No.

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KARL SAIER, a witness for the National Labor Relations Board, having been previously duly sworn, was recalled, resumed the stand, and examined and testified further as follows:

Cross-examination

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Q. (By Mr. Glenn) Mr. Saier, what is the procedure in Local Union 20 for admitting persons into membership?

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A. The Constitution and By-Laws have some procedures that are, you might say, no longer necessary, since the amendments to the Wagner Act, inasmuch as we can no longer deny membership to anybody because of race, color or creed, only if they fail to pay the necessary initiation fees and dues.

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Q. Now, my question is, suppose that a person makes application to your union for membership, what is the procedure that the union goes through in admitting them to membership?

A. The procedure of the union is to examine his application to see if he is a citizen, and if he is not a Communist, he is always accepted regardless of whether he is a Company stooge or what, we still have to admit him to membership.

Q. Do your have an investigating committee?

A. We don't follow that procedure any longer, as long as the application is signed by two good standing members of the union, that is all that is necessary.

Q. But that it is—it is the procedure of the union set out in your Constitution, isn't it?

A. The procedure is set out in the Constitution.

Q. That you must have an investigating committee?

A. That is right.

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Q. (By Mr. Glenn) Do you issue membership cards to people who have not received a majority vote of the members of the union?

A. Yes.

Q. Under your present procedure?

A. Yes.

Q. Now, did any of the employees of the Respondent Coca Cola Company in this case, who signed authorization cards, have they received union membership cards from Local 20?

A. They have not received them because the matter has been held up pending recognition of the union.

Q. Do I understand you to mean that if the union

is not recognized, or not certified as the bargaining representative

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of the Coca Cola Company, that no union membership cards will be issued to those people?

A. Definitely not. Any employee of the Coca Cola Company can join the union whenever he so desires.

Q. But still no union membership cards have been issued?

A. Not as yet.

Q. Now, were any of the Negro employees of Coca Cola, who signed union membership cards, issued—who signed union authorization cards, have they been issued union membership cards?

* * * * * * *

A. They have not been issued membership cards, for the simple reason that the set-up of the Local has not been determined; it hadn't been determined whether they were going to be a separate local union or to be a part of Local 20.

Trial Examiner Ferguson: You mean that applies to all the employees of the Company, white or colored?

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A. That is correct, there is no discrimination. I would like to point out that this means that both colored and white employees of Coca Cola Company are members of the union. They have been obligated.

Q. (By Mr. Glenn) They haven't been issued any membership cards?

A. That is true.

Q. They haven't paid any dues?

A. Let us say that some of them have paid dues.

Q. Well, you say it. How many of them haven't paid dues?

A. I will say that some of them haven't. I won't say that none of them haven't.

Q. Will you say that any of the Negro employees have paid dues?

A. No.

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Q. Now, none of the Negro employees of Coca Cola who signed authorization cards were elected to membership in the union by a majority of the union membership, isn't that correct?

A. That is correct.

Trial Examiner Ferguson: Well, were any of the white people that signed authorization cards at the Coca Cola Company elected by a majority of the members?

A. No.

Q. (By Mr. Glenn) You stated on direct examination the other day that no Negro has ever been admitted to membership in Local 20.

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A. Negroes were admitted to membership, according to my records, on May 10th.

Q. (By Mr. Glenn) May 10, 1951?

A. That is right.

Trial Examiner Ferguson: You are talking about this Company?

A. Coca-Cola Company.

Q. (By Mr. Glenn) You mean that they were admitted to membership in that you gave them the oath, and they attended these organizational meetings, and some of them attended one meeting of Local 20, is that what you mean?

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A. Yes.

Q. But they have not paid any dues, is that right?

A. The payment of dues, I would like to explain once more, was allowed to, you might say, hang fire, until the Company had been organized. They weren't denied the right to pay dues.

* * * * * * *

Q. (By Mr. Glenn) They haven't paid any dues as of this date?

A. That is right.

Trial Examiner Ferguson: Neither have the white people, have they?

A. For the record, one white person has, but I don't want to divulge his name. In fact, to go a little farther, more white people have, that have transferred from the Coca Cola Company to our jurisdiction.

Trial Examiner Ferguson: Well, you are speaking about people who are presently employed?

A. People that are presently employed, there is one of their employees that has paid his initiation fee.

Q. (By Mr. Glenn) And none of the Negro employees who signed the authorization cards have been issued membership cards in the union?

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A. Neither have the white.

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A. To my knowledge, there has never been an application presented asking for admittance to the union of a colored person.

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Q. And none has ever been admitted?

A. Not to my knowledge.

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TRANSCRIPT OF TESTIMONY

December 20, 1951

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MARTIN F. SCHMIDT, a witness called by and on behalf of Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Skaggs) You are Martin F. Schmidt?

A. Yes, sir.

Q. How old are you, Mr. Schmidt?

A. 33.

Q. What ~~position~~ do you hold, or offices do you hold, at the Coca Cola Bottling Company of Louisville?

A. Vice-President and Treasurer.

Q. Mr. Schmidt, are you generally in charge of the operations of the Coca Cola Bottling Company, both plant and sales?

A. Yes, sir, I think you would say that.

Q. Do the supervisory employees, such as Mr. Miller, and Mr. Ferst, report directly to you concerning the activities of their departments?

A. Yes, sir.

Q. Do the route managers and Mr. Sargeant, who is the basement foreman or basement supervisor, do they also report directly to you from time to time?

A. From time to time, yes, sir. They report to Mr.—to

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their immediate superior most of the time.

Q. In other words, the immediate superior of the route managers is Mr. William Miller?

A. That is right.

Q. And the immediate superior of Mr. Sargeant is Mr. Ferst?

A. That is right. I see those people nearly every day, though, and they have occasion to say something to me.

Q. Now, you have two other supervisory employees, Mr. Weinhart—

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A. Yes, sir, advertising manager.

Q. —and Mr. Neal of Cooler Service and Maintenance, Mr. Paul Neal?

A. Yes, sir, that is right.

Q. Do they occupy similar status to Mr. Ferst and to Mr. Miller with relation to their particular departments?

A. Yes, sir.

Q. Mr. John McHugh is not a supervisory employee, is he?

A. Well, he has some supervisory duties under Mr. Miller. He is not a department head.

Q. He handles telephone-truck drivers and that sort of thing, is that correct?

A. Yes, sir.

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Examination

Q. (By Trial Examiner Ferguson) Mr. Schmidt, I am asking you these questions at this time, as sort of background material. I have been wanting to know about this thing, but I thought I would wait until you took the stand. How many employees do you have in the plant, on an average? I don't mean right at this moment, but on an average.

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A. 173 at the moment, I think.

Q. It would run around 170?

A. Yes, a few more or a few less.

Q. Now, how is that operation organized? I understand in a general way that you have production and you have these route salesmen, and so on.

A. Yes, sir.

Q. Will you just tell me in your own way, now, about your various departments and what they do? Make it brief, sketch it for me, please.

A. Well, the production department which would be about 80 people all together—

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Q. Now, production, what is that limited to?

A. They have everything to do that is connected with the manufacturing of the product, and the operation of the plant itself, the building.

Q. That includes the bottling and the casing and everything, does it?

A. Yes, sir, that includes taking the cases from our route salesmen.

Q. When they come back with empties?

A. Yes, sir, handling the cases, cleaning the bottles, putting the product back in the bottles.

Q. Putting the bottles in the cases?

A. Yes, sir, rehandling the cases when they are full, and sending them out to the trucks again to go out again.

Q. That covers the production. How many routes do you operate?

A. 57.

Q. And each route is manned by what you call a salesman?

A. Yes, sir, a route salesman.

Q. Now what does he do? He drives a truck out over

his route and supplies the customer, is that it?

A. Yes, sir, that is right.

Q. And does he get a commission on that?

A. He gets a commission on his sales.

Q. Does each route salesman have an assistant, or just one

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man to a route?

A. Yes, just one man on each truck, normally.

Q. And do you have any other departments? Production and sales are two departments you have mentioned. Do you have any other?

A. Yes, sir, we have an advertising department.

Q. Advertising department?

A. It consists of about eight men and has to do with the putting up of our advertising material in our territory.

Q. Now, these supervisors, one supervisor will have several routes under his jurisdiction, is that right?

A. Yes, sir, he will have roughly one-fourth of the routes.

Q. You have four route supervisors?

A. Yes, sir.

* * * * * * *

Q. (By Mr. Skaggs) You also have your cooler maintenance department, do you not?

A. Yes, sir.

Q. Will you explain to the judge about how many employees are in that department, and the duties of the employees there?

A. That department would have about eight or ten under a

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department head, and their duties are to install and deliver and service the Coca Cola vending machines that we have

in various locations around the city, and to bring in those machines for reconditioning or repair.

Q. Mr. Schmidt, in addition to the salesmen who operate the 57 routes of the Company, you also have some telephone-driver salesmen or special delivery salesmen who operate little pick-up trucks that carry, oh, fifteen, twenty, or thirty cases of Coca Cola, do you not?

A. Yes, sir, those are usually young fellows who haven't been with us very long, who are getting the feel of the business.

Q. And about how many of those employees do you ordinarily have?

A. Oh, anywhere from five to eight, maybe.

Q. Now, a route salesman, in addition to calling on the customers on the route, and delivering Coca Cola and picking up empty cases, has certain other duties, does he not?

A. Yes, sir, in connection with merchandising.

Q. Will you state those briefly to the Court?

A. Well, it is his duty to see that sales of Coca Cola on his route are kept up to standard, and increased by all means posible, such as seeing that the man has proper refrigeration, or proper displays of our product.

Trial Examiner Ferguson: May I ask you one question: How

many of these 57 routes are interstate routes, that is, going to other states? I suppose principally, Indiana isn't it?

A. Yes, sir.

Trial Examiner Ferguson: Do you serve any territory in any other state except Indiana?

A. No, sir.

Trial Examiner Ferguson: How many routes do you have that serve territory in Indiana?

A. Well, sir, I would just be guessing, but I would say a dozen.

Trial Examiner Ferguson: About 12?

A. Ten or twelve.

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Q. (By Mr. Skaggs) Mr. Schmidt, the routes, I believe, are divided into different classifications, the sales routes?

A. Yes, sir.

Q. "A", "B", "C", and "D", are those the routes?

A. Yes, sir, that is right.

Q. And whether a route is "A", "B", or "C" or "D", is dependant upon the class or volume of sales in that particular route, is that correct?

A. Yes, sir, substantially.

Q. Do you keep charts that enable you to determine whether sales are up or down in the particular route?

A. Yes, sir, we keep records of sales on each route.

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Q. So that you are able to tell when sales are up or down by referring to those records and making a comparison with months in other years?

A. Yes, sir.

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427

Q. Who pays for their uniforms?

A. The Company pays half of the cost of all the order, and the employee pays half the cost.

Q. Who pays for having uniforms laundered and keeping them neat?

A. The Company pays that cost completely.

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Q. Did you ever have occasion to observe Mr. Kamenish as he was operating his route, with particular reference

to parking?

A. Yes, sir, I see our trucks on the street all the time. I remember that on one or two instances, I saw Kamenish's truck on his route improperly parked.

Q. Do you recall how the truck was parked at the times you observed it?

A. Well, it was simply pulled over on the wrong side of the street, as I remember.

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431

Q. Now, you heard Mr. Davis' testimony relative to the occasion that he talked with you in your office. Will you

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tell us what occasioned your conversation with Davis?

A. Yes, sir. I had asked Mr. Ferst to bring Davis in to talk to him in the first place. We had had some of these grapevine reports about a little disturbance of some kind among the colored boys, and we were interested in finding out what it was, so, since we had had what you might call pleasant relationships with Richard Davis, and he had gotten a little help from us, and we thought that he was a boy that would tell us what he knew about it, what was going on, if anything.

Q. Had it come to your attention that the colored boys were upset about their working conditions?

A. No, sir, I didn't have any reason to know what they were upset about, if anything.

Q. Well, when Mr. Ferst, when he brought Davis into the office, what did you say to him and what did he say to you?

A. Well, he just—we just told him that we hoped he would be able to give us some information about any difficulties or disturbance, or any unusual situations among the

colored boys.

Q. Did you ask him what complaints the boys had?

A. Yes, sir, I asked him if there was any trouble.

Q. I believe that he testified that he said the boys wanted more paid holidays and better working conditions, generally. Is that about your memory of the situation?

A. I really didn't remember that he mentioned the paid holidays, but he might have.

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Q. (By Mr. Skaggs) Mr. Schmidt, will you state what if anything you said to Davis and Davis said to you up there relative to his membership in a union or the signing of a card?

A. Well, we asked him about whether he knew of any complaints or gripes among the boys he worked with. He seemed, for some reason, to think that had something to do with union activities, and he volunteered the information that he wasn't in the union and wasn't concerned with it.

Q. You had had Mr. Ferst bring Davis there for the purpose of discussing the general upset condition that was going on in the basement, is that true?

A. Yes, sir.

Q. At that time, did you have any knowledge that there was any attempt being made to organize the plant?

A. No, sir, no, nothing definite to go on.

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Q. Do you recall whether or not Mr. Ferst said anything to him about a union, or mentioned the word union to him?

A. I am sure he didn't until Davis brought it up, and

either I or Mr. Ferst, I don't remember, said that we weren't interested in his union feelings.

Q. You just told him you weren't interested in his sympathy or lack of sympathy for a union, is that correct?

A. That is right.

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Q. (By Mr. Skaggs) What is the customary method used in the plant used to bring to the attention of an employee that a manager wants to see him?

A. Several methods would be used. In a case where an employee is wanted before he goes to work, that particular method is used sometimes of taking his card out of the rack so that he knows, he is put on notice that somebody wants to see him before he gets started.

Q. When you or Mr. Ferst told Davis that he could go back to his work, was his card marked up so that he suffered no loss of time?

A. Yes, sir.

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Mr. Skaggs: Mr. Ferguson, I desire to call Mrs. Della McIntosh, and examine her for the Kentucky Unemployment Insurance Division, in the Louisville office, in connection with records of that office and conversations which she had with Mr. Delmar Dale Hoagland, one of the charging parties,

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or one of the persons aggrieved.

Trial Examiner Ferguson: One of the alleged discriminatees?

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Trial Examiner Ferguson: Would you like to be heard

on this, Mr. Frishe?

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Mr. Frishe: Well, the Division of Unemployment Insurance objects to any testimony Mrs. McIntosh may be able to give in this matter concerning any statement or document given by Dale Hoagland, in connection with any unemployment insurance matter, any information coming from the worker Hoagland or the Company, the Coca Cola Company.

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Trial Examiner Ferguson: I don't want to prolong this

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matter. I feel sure that it is so remotely collateral that it wouldn't be competent. If there had been no objection as to the matter being privileged, I don't think it would be competent.

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Trial Examiner Ferguson: Do I understand that you had submitted a motion on behalf of the Kentucky Unemployment Commission to quash this subpoena?

Mr. Frishe: Yes, your Honor.

Trial Examiner Ferguson: It will be sustained. The subpoena is quashed. More than that, I am quite convinced that the testimony that Mr. Skaggs stated he proposed to elicit from this witness, the matter he proposed to show by this witness, is wholly incompetent, immaterial and irrelevant, to any issue in this case. Now, we will proceed with the next witness.

Mr. Skaggs: Judge, is it proper that I request whether your basis for quashing the subpoena is on the irrelevancy and incompetency, or because the matter is privileged?

Testimony of Martin F. Schmidt

Trial Examiner Ferguson: Lack of pertinency, that is

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one reason; lack of pertinency to any issue in this case. Further, I refused your offer of proof, and I take it that that was all you proposed to show by this witness. If you have other matters that she knows anything about, that is different.

Mr. Skaggs: That is all that I know that she knows about, Judge.

. . . . . .

Q. (By Mr. Skaggs) Mr. Schmidt, you have heard the testimony of the witnesses for the General Counsel relative to a meeting that was held for the sales employees, and likewise a meeting that was held for the production employees on or

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about April 25th, or April 26th, 1951?

A. Yes, sir.

. . . . . .

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Q. (By Mr. Skaggs) Mr. Schmidt, the meeting for the sales employees, at what time and what date was that meeting held, to the best of your memory?

A. It was held at 4:00 p.m. on that day, but we have had some discussion what day it was. It might have been April 25th. I don't have any—

Trial Examiner Ferguson: You have no record of it?

A. I didn't have any record of that.

Q. (By Mr. Skaggs) Mr. Schmidt, the meeting for the production employees was held in the morning, am I correct?

A. Yes, sir, of the next day.

Q. The day following the sales meeting?

A. Yes, sir.

Q. And about what time in the morning was that?

A. Right at 8:00 o'clock, I believe.

Q. How long did the sales meeting last?

A. As I remember, it didn't run unusually long; I would say 30 to 45 minutes.

Q. And how long did the meeting of the production employees

last?

A. I would say about the same, I am not sure.

Q. You addressed the employees of both production and sales at those meetings, did you not?

A. Yes, sir.

Q. Is it customary that you have meetings, or is it a Company custom that meetings are held from time to time with the employees?

A. Yes, sir.

Q. Is that really true in all departments of the Company?

A. Yes, sir.

Q. Customarily, Mr. Schmidt, is notice given of those meetings?

A. Yes, sir, some form of notice ordinarily.

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Q. (By Mr. Skaggs) How long a period of time is considered by the Company to be adequate notice in order to insure the attendance?

A. Well, we can get the attendance on very short notice. We usually give part of a day or a day or two notice, whatever it works out.

Q. Directing your attention to the meeting of the salesmen, or the driver-salesmen and the sales department, what did you discuss with the employees and what did you say to the assembled employees on that occasion?

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A. At that time we had some matters to so discuss with the salesmen that had been hanging fire for some short time. We wanted an opportunity to discuss those things with them, such as beginning of the Summer season, and stocking up their dealers for Derby Day which wasn't too far off, and that sort of thing; merchandising efforts for the Summer.

Q. Now, you discussed the sales program, the beginning of the Summer season, stocking up the dealers for Derby Day, and that was done at this meeting, wasn't it?

A. Yes, sir.

Q. And then at the end of the meeting, it has been testified to that you made certain statements relative to the rights of employees to belong to labor organizations. Will you give us, tell us what you said to them on that occasion?

A. Well, the testimony of the witnesses was substantially correct, if I am permitted to refer to it. I told our group that our long-standing policy had been that they were permitted to join a union if they wanted to, or refrain from joining; that they were permitted to go to any church they wanted to, or undertake any educational activities; that none of those things, lodge membership and such, had anything to do with our employment.

Q. Did you tell them that it was proper for them to belong to a union if they wanted to?

A. Yes, sir.

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Q. Did you urge them to consider the situation carefully?

. . . . . .

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A. Yes, sir; we talked, I talked about conditions in our plant, and the necessity of taking careful thought before making any important decisions, about employment or anything else, and I hoped that they would consider anything they heard, one way or the other, very carefully.

Q. (By Mr. Skaggs) On that occasion, did your talk make any reference to—strike that. This portion of your remarks that were directed to the employees with reference to Company policy and their rights and obligations, at what time in the meeting did that occur? At the beginning or the end or the middle, or where?

A. At the end of the meeting, it was the last comment of the meeting, I believe.

Q. You stated, I believe, that the meeting lasted 35, 40, or 45 minutes. How much time did you devote to the statement of the Company policy, discussion of working conditions and the rights and obligations of the employees?

A. I really can't recall.

Q. Now, at the production employees' meeting, what was discussed with the production employees?

A. Some of the same things as we talked about to the sales department employees, and naturally some of the things about

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stocking dealers and similar things that happen outside the plant they were interested in. We talked about going into the busy season; the busier season, rather; and it was necessary for every employee to give his best to the job.

Q. And then when you came around to talking about Company policy, the rights and obligations that the employees had, did you say substantially the same to the production employees that you had said to the sales employees?

A. Yes, sir, we thought that a nice, good, clear state-

ment of Company policy at that time might be helpful.

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Q. It has been testified relative to the salesmen's meeting that at the end of the meeting, Mr. Ferst addressed a remark to Mr. Austin and to Mr. Heagland and to a person named George. Did you hear Mr. Ferst make any statements in the meeting?

A. Yes, sir.

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Q. When you spoke, did you speak from a platform or were you standing with the employees?

A. I was on the same level as the employees.

Q. And in part of them or in just a kind of group?

A. Well, I was in front of them. They were lined up in rows in the chairs.

Q. Was Mr. Ferst up there with you?

A. No, sir, he was back in the audience.

Q. Then Mr. Ferst did not address the employees' group at that time, did he?

A. No, sir.

Q. Will, did anybody talk to the employees other than yourself, by way of giving them an address? I mean, did anybody else make a speech to the employees?

A. Nobody made any remarks of any length. I don't remember whether Mr. Miller possibly had something to say about sales work of not. If he did, it was very short.

Q. Well, what did Mr. Ferst say, if you recall, and at what time in the meeting did it occur?

A. Well, his remarks occurred right at the end of the meeting, just immediately before the meeting was over, and he apparently wanted to see if there were any individuals who had complaints, because when he got up he asked several people if they had any complaints.

Q. Did you hear him ask Austin?

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A. I think I remember that he did, yes, sir.

Q. Did you hear him call out the name of Delmar, or Hoagland?

A. I can't recall what other names he mentioned.

Q. Austin is the only name that you recall?

A. Yes, sir.

Q. Did you hear Austin make a response to him?

A. Yes.

Q. Will you tell him—tell us, what Austin said?

A. Well, substantially what he said was that when you have a complaint or suggestion—I don't remember which he said—and you try to tell it to somebody, they make a darn fool out of you, although he didn't use words as nice as I used.

Q. Well, has Mr. Austin made a fool out of himself by some of his suggestions from time to time?

A. Well, I expect he has, although we never tried to tell him that.

Q. How long has Mr. Austin been there with the Company?

A. I believe it is in the neighborhood of 20 years; I am not real sure.

Q. How old a man is Austin, if you know?

A. I think he is about 60.

Q. Now, after Austin said that, did Mr. Ferst say anything more to him?

A. No, sir, I don't recall that he did.

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Q. Coming back to Hoagland, did you have anything to do with Hoagland's discharge?

A. Not at that time, no, sir, not specifically.

Q. He was correct in his statement that he was discharged

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by Mr. Miller?

A. Yes, sir, that is correct.

Q. Had Mr. Miller reported to you in connection with Hoagland's work from time to time?

A. Yes, sir.

Q. You were familiar with the character of his work?

A. Yes, sir.

Q. Was it good or bad?

A. It was poor.

Q. As to Mr. Kamenish, did Mr. Miller discuss Mr. Kamenish's case with you?

A. He discussed Kamenish with me a number of times.

Q. And his work?

A. Yes, sir.

Q. Did other route managers discuss Hoagland and Kamenish with you?

A. I think possibly we had some short conversations about them, I don't remember.

Q. You did not see Mr. Kamenish the day he quit or was terminated?

A. No, sir, I don't recall seeing him.

Q. Did Mr. Ferst discuss Thomas Krooks and the character of his work with you?

A. Yes, sir.

Q. Did he discuss any infractions of Company rules?

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A. Yes, sir, several times.

Q. You knew that Mr. Ferst expected to discharge Thomas Brooks?

. . . . . .

A. Mr. Ferst and I had discussed his poor work, the

things he was doing, and it was a potential situation that we might have to discharge him. He didn't discuss it with me that day that Brooks was discharged.

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Cross-examination

Q. (By Mr. Kimmell) Mr. Schmidt, I believe you stated that you observed Frank Kamenish in improper uniform?

A. Yes, sir.

Q. How many times did you observe him in improper uniform?

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A. I couldn't say exactly, but it was a number of times. I saw him in and out of the plant at various times.

Q. In what ways was his uniform improper?

A. Well, for a while he was wearing some sort of a blue athletic jacket, and other times he was wearing a baseball hat.

Q. About when was it?

A. Well, it was early this year, I think maybe March.

Q. Well, it would have to be sometime during the cold or cooler months of the year wouldn't it, to be wearing—if he was wearing a jacket?

A. Yes.

Q. And I believe you stated that you spoke to Mr. Miller about it?

A. Yes, sir.

Q. Did you instruct Mr. Miller what to do about the situation?

A. Well, I suggested that he see if he could get him straightened out.

Q. Well, was the situation straightened out?

A. Yes, sir, eventually.

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Q. (By Mr. Kimmell) After March of 1951, did you ever see Kamenish in improper uniform?

A. I couldn't remember whether I did or not. I might have.

Q. Well, when might you have, do you know when?

A. No, I don't. I didn't make any record of the times.

Q. Assuming you might have, did you talk to Kamenish about

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it?

A. No, I didn't talk to Kamenish.

Q. Again, assuming that you might have, did you talk to Mr. Miller about it?

A. Well, I mentioned it to Mr. Miller several times.

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Q. He—now, do you know why Thomas Brooks was fired?

A. Yes, sir.

Q. Was one of the reasons that he was fired, because of his smoking?

A. Yes, sir.

Q. Now, you say you once caught Carnie Brooks, his brother,

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smoking?

A. Yes.

Q. And you gave him a one-day suspension?

A. Yes, sir.

Q. Do you care to explain why such a different punishment was meted out for similar infractions?

A. There is no set punishment on that, unless it is

a very serious one; but Thomas Brooks has been warned about smoking a number of times. Possibly Carnie Brooks had, too, but the character of Thomas Brooks' work was such that, along with the infractions of various rules, he was committing, we just couldn't keep him on any longer.

Q. Carnie Brooks' work was more satisfactory, is that it?

A. Well, Carnie wasn't doing all the things, or acting quite as unsatisfactorily as his brother Thomas.

Q. Which things are these?

A. Well, Thomas had given trouble about leaving his working place too soon.

Q. When was this?

A. A number of times during, oh, since the first of the year, I suppose, up until the time he left.

Q. How many times was it, do you know?

A. I don't know.

. . . . . .

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Q. (By Mr. Kimmell) Now, as I understand it, you held a meeting of the sales employees on April 25th in the evening. Was any prior notice given of such meeting?

A. We notified them.

Q. When?

A. A few minutes before, half an hour maybe, or an hour before that.

Q. But you had none of this one or two days' notice?

A. No, sir.

Q. And then the next day you held this production meeting?

A. Yes, sir.

Q. Now, when did you talk to Richard Davis, do you recall?

A. I really don't recall.

Q. Well, was it before or after these meetings?

A. I tried to bring that back to my memory the other day, but—it seems to me that it was just before, just before that time.

Q. It was before the meeting?

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A. Yes.

Q. And at that time you called Davis up because you heard there was rumors of dissatisfaction among the colored employees?

A. Yes.

Q. What were these rumors? What did they relate to?

A. We didn't know.

Q. Did they relate to the union, perhaps?

A. We didn't know.

Q. When did you find out about the union?

A. We first found out about the union on April 28th, when Mr. Saier was outside the plant distributing leaflets.

Q. Well, I understood you to say at the April 25th meeting you spoke about the union to the employees.

A. Well, I thought you meant when we found out about this particular union.

Q. No, I mean about any union.

A. Well, the grapevine rumors had come back that this had something to do with unions, that there was union talk going around.

Q. When did these grapevine rumors come about?

A. Well, I would say for a period of a few days before the time that we thought we would state our policy.

Q. Were these grapevine rumors around at the time you interviewed Richard Davis?

A. They might have been, yes.

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Q. Then that was the disturbance among the colored

boys?

A. Yes; I don't know what it was.

Q. Now, you say at the sales meeting of April 25th, you gave the drivers instructions with respect to stocking up dealers for Derby Day. Now, tell the Trial Examiner in your own words, what that was all about, what was the nature of that, what was the purpose?

A. Well, that simply means that certain outlets, you can expect heavy business on that day, or certain outlets, certain dealers, possibly you can't even make a delivery to on that day, and that special consideration has to be given to each dealer. Of course, some of them are not affected at all.

Q. But af any rate, as a general matter, you try to stock them up before that day?

A. Yes, sir.

Q. Now, if you stock a dealer up one or two days preceding Derby Day, would you also make deliveries on Derby Day?

A. It would depend on the individual dealer whether we thought he needed it or whether he thought he needed it or wanted it.

Q. Wouldn't that serve the purpose in stocking in advance that you wouldn't have to make deliveries on Derby Day?

A. The purpose is to make Derby Day easier, since it is a special sort of day around the town.

Q. By "easier", you mean the drivers would have less work

to do?

A. Well, he would find his work easier to get through with.

Q. He would get through quicker, wouldn't he?

A. And not run into too many undesirable situations that he wasn't expecting.

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Q. (By Mr. Kimmell) Mr. Schmidt, you stated that one or two times you saw Frank Kamenish improperly parked?

A. Yes, sir.

Q. Do you remember what street this was he was improperly parked on?

A. I don't know why I remember this, but it seems to me I can place him on one of those instances at—about 15th and Ormsby.

Q. 15th and where?

A. And Ormsby, but I can't be sure why I think that, though.

Q. Do you know what street it was, 15th or Ormsby?

A. No, I can just form a picture of him parked at the corner of 15th and Ormsby, on the southwest corner, but I can't be sure of that.

Q. Is that a busy intersection?

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A. Yes, sir, it is fairly busy.

Q. Was the Company notified that he received a citation from the police department for so improperly parking?

A. On that occasion?

Q. Yes, on that occasion.

A. Not that I know of.

Q. Well, would the Company be informed of a police citation?

A. Not in every case. Sometimes the route salesman will just take care of it himself and we wouldn't hear about it.

Q. Well, the Company owns the trucks, do they not?

A. Yes, sir.

Q. Now, when were these one or two occasions when you say you saw Frank Kamenish improperly parked?

A. I don't know.

Q. Well, were they this year?

A. Yes, sir, I think they were.

. . . . . .

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Q. (By Mr. Kimmell) The question is, did you instruct Mr. Miller to take any action with respect to this?

A. I don't give him detailed instructions.

Q. Well, do you give him any instructions?

A. When I tell him something, I know that he will take the proper action, if any action is necessary.

Q. Did you ever see any other employee improperly parked?

A. Yes, sir, I have seen other employees.

Q. How many employees?

A. I don't know.

Q. About how many?

A. Well, over the space of ten years, I have seen quite a few improperly parked, possibly, I have no idea what the number would be.

Q. Did you report these occasions to Mr. Miller?

A. Usually.

Q. Did you give him any instructions with respect to what to

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do?

. . . . . .

A. Well, those things happened in the course of everyday, various things, and I can't possibly recall any of those conversations.

Q. (By Mr. Kimmell) In other words, it is not an unusual matter for a driver to improperly park?

A. It is not unheard of, no.

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Recross-examination

Q. (By Mr. Kimmell) Now you testified that before you held your two meetings with your employees on the 25th and 26th of April, you heard rumors of union organization, is that true?

A. I believe I testified to that.

Q. How long before these two meetings did you hear rumors, how long a period?

A. I don't really remember exactly. I would say a few days.

Q. Didn't you hear these rumors between the 15th and 20th of April, 1951?

A. I don't know whether I heard them during those days or not.

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Q. I ask you to read a document which bears your signature, which is an affidavit prepared by your Counsel, incidentally; read this paragraph (indicating) and see whether that refreshes your memory.

A. I signed it; I must have believed it at the time.

Q. Will you answer the question now, about how long a period, between what dates, did you hear these rumors.

A. I will repeat what I said in my affidavit, between the 15th and 20th.

Q. (By Mr. Kimmell) Of April, 1951? And when did

you say you had this conversation with Richard Davis?

A. I said I really couldn't recall, but I believe I said a little while ago that I thought it was probably before these meetings we have been talking about.

Q. Was it between the 15th and 20th of April?

A. It might have been; I don't know.

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Examination

Q. (By Trial Examiner Ferguson) Now you have been with this plant since 1941; am I correct about that?

A. Since 1940, sir.

Q. You say they have had this—I understood you to testify they have had this no smoking rule since 1941 when the plant was constructed, is that what you said?

A. Yes, sir.

Q. Now, in that time and up to this date, how many men, and who are they, if you know, have been discharged for smoking?

A. I don't know the names, and I would have to make just an estimate about how many there would have been. I might add also, I was not at the plant for four years, when I was in the Navy.

Q. Well, within your knowledge, how many men have been discharged for smoking?

A. I am just trying to think, Mr. Examiner. The number of times we discussed that matter around, about somebody in that connection, I would say maybe a dozen times, a man has been finally discharged for the reason of smoking.

Q. You say there has been as many as a dozen men discharged to your knowledge for smoking?

A. I am trying to think back of the number of times

that has come up.

Q. Or do you mean you have discussed it a dozen times? Now, I wasn't clear on your answer.

A. Well, what I meant, sir, I was trying to give you a figure based on the number of times that I can remember talking

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about this fellow or that fellow being found—

Q. With some of your supervisors?

A. Yes, sir. —being found smoking and terminated, or whatever the term may be.

Q. Well, you fired him, did you?

A. Yes, sir.

Q. And was that the sole reason you fired him, for smoking?

A. Well, sir, I am afraid I can't give you a very good answer on that.

Q. All right.

A. I don't know—well, let me say it this way if I may: Most of our people, we try to be reasonable about enforcing our instructions. If it is a pretty severe case—where a fellow will get fired for not obeying one instruction, one time. We try to give people a warning and give them some lee-way, and in most all cases where a person is fired, there is a history of poor work or disobedience of instructions behind it.

Q. Now, these instructions that you say you issued to your supervisors and department heads about keeping hands off of any union organization in the plant—now, I am just condensing it, I am not trying to requote what you say—

A. Yes, sir.

Q. —but these instructions, how were they given, were they given in writing, or did you convene the supervisors

in a meeting and give them these instructions, or did you go

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around and speak to them individually, or how did you give them to them?

A. They were not in writing, sir.

Q. All right, now, how were they given?

A. They were given verbally.

Q. You mean in a group meeting or individually, or how?

A. Well, in small groups. You see, we have six department heads and five route managers and some other supervisory people.

Q. I know, but how did you give them those instructions?

A. Well, I gave them to the department heads myself, verbally.

Q. You mean to each individually, or did you get them together and tell them, "Now, this thing is brewing here in the plant."

A. I think probably more than one were together at a time. I didn't call a meeting of everybody in to say, "Let's talk about this," but I mean, I am in touch with all these men several times a day, and we are all in a confined area.

Q. Well, did you give all those various instructions you were talking about to each of these department heads?

A. Yes, sir, I think I did.

Q. Now these two meetings that you called, at 4:00 o'clock one afternoon you had a meeting of the salesmen, and at 8:00 o'clock the next morning, the following morning, you had a

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meeting of these production people, and the notice was just such notice as was given immediately preceding the

meetings, is that right?

A. Or a short time before, yes.

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Q. And what was the purpose of those meetings? Why did you call them?

A. The purpose of the first meeting with the sales department, sir, was to take up some matters which we had on our check-list for the sales department, and to give them an opportunity to hear a repetition of our policy on membership in various types of organizations.

Q. That was the purpose of it, then?

A. Yes, sir, to take up those matters.

Q. And what was the purpose of the meeting the next morning at 8:00 o'clock, of the production people?

A. The principal purpose of that meeting was to give them the repetition of our statement of policy on membership in various organizations, because we felt that, after giving it to the sales department, we should cover the rest.

Q. Then the meetings were because you had heard that there was union activity going on in the plant, is that right, and you wanted to clarify your position with the employees, is that

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right, or not? Am I stating it correctly, or not?

A. That was one of our purposes.

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Recross-examination

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Q. (By Mr. Kimmel) Was anybody that you know of, dismissed during 1951 for smoking, outside of Thomas Brooks?

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Testimony of Martin F. Schmidt

A. It seems to me that a boy named Pullen was discharged for smoking. I have a vague recollection of Mr. Ferst telling me that.

Q. (By Mr. Kimmell) Do you remember what time during 1951 he was discharged?

A. No, sir, I don't.

Q. Was it before or after April, 1951?

A. It seems to me it was since then.

Q. Since April?

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A. Yes.

Q. Was anybody discharged during 1950 for smoking?

A. I don't recollect.

* * * * * * *

Q. (By Mr. Kimmell) But you know of 12 individuals who were discharged for reasons which included smoking?

A. Well, at the Examiner's suggestion, I made a very rough guess of about a dozen situations that I could remember discussing.

Q. It is very unusual to discharge a man for smoking, isn't it?

A. Well, I suppose to discharge a man for any reason is somewhat unusual. You don't do it every day.

Q. Is there any place set aside for Negroes to smoke in your plant?

A. The same places that the white boys smoke.

Q. Where is that?

A. That is inside both ends of our garage area, near the exit and entrance doors, inside in the winter, and outside in the summer.

Q. Where is the garage in relation to the basement?

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A. Well, it is immediately behind the basement and of

course, up on the ground level.

Q. Is there any doorway or other access from the basement to the garage?

A. Yes, several stairways.

Q. You have to go up a flight?

A. Yes, sir.

Q. Isn't it true that your driver-salesmen frequently smoke in the checker's office?

A. Yes, sir, that is one of the permitted areas.

Q. Have you ever observed any of the driver-salesmen smoking in any unpermitted areas?

* * * * * * *

A. No, sir.

Q. During 1951, have you ever observed any—outside of Thomas and Carnie Brooks—have you ever observed any other production employee smoking?

A. You mean smoking in a restricted area, I guess?

Q. In a restricted area, of course.

A. I don't remember of any incident. I have seen cigarette butts on the floor, but I don't remember of any employees I have seen.

Q. When you saw these cigarette butts on the floor, what

action, if any, did you take about it, or did you take any action about it?

A. There wasn't anything I could do about it at that time.

Q. Did you talk to your supervisors about the condition?

A. Not right at those particular times. I have suggested to Mr. Sargeant and Mr. Ferst at various times that they keep after the boys about sm[redacted], because if you

don't they will overrun you.

Q. In other words, you were aware of the fact that smoking was being done in the plant?

A. There was evidence that somebody was smoking against instructions.

Q. Well, how many cigarette butts did you find on the floor?

A. I don't know, I would see one now and then somewhere.

Q. And you just thought there was one individual breaking the rules?

A. I had no idea of one individual or how many. There was just one that I saw.

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RAYMOND SHEEHAN, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Skaggs) Your name is Raymond Sheehan?

A. Yes, sir.

Q. How old are you, Mr. Sheehan?

A. 37.

Q. Where do you live?

A. 2620 West Main Street, Louisville, Kentucky.

Q. How long have you been employed by Coca Cola Bottling Company?

A. Over 20 years.

Q. Your present position is that of a route manager?

A. It is.

Q. How many routes do you have under your super-

vision?

A. 14.

Q. Is the Shephardsville and Suburban route under your jurisdiction?

A. It is.

Q. How long have you been the supervisor that had that route included under your supervisory duties?

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A. Oh, I should say around three years.

Q. Do you know Mr. Delmar Dale Hoagland?

A. Yes, very well.

Q. How long have you known him?

A. Around 20 years.

* * * * * * *

Q. Now, will you tell me on what date Delmar Hoagland bid for, or rather on what date did he receive the S&S or Sheapardsville and Suburban route?

A. Well, as close as I can remember it, it was around in March sometime.

Q. Of this year?

A. Of 1950. No, of this year, of 1951.

Q. May I refresh your memory by asking you if the date he received that route was March 15, 1951?

A. It was right around that time.

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Q. Now, will you tell the Court what, if anything, was said to Mr. Hoagland relative to the temporary character of the assignment of the route to him?

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A. Well, the reason the route was temporary, when the bulletin was put on the board that the route was open, due to the man before him had a bad back and quit, but the

route was open and held open for Bobbie Oliges, who was to return from the Navy, I think, on the 28th of April, and it was actually his route, it was just to be held open for that time.

Q. Mr. Hoagland knew that?

A. He very well knew it, and those who bid on it knew it.

Q. Now, other people bid on the route besides Mr. Hoagland?

A. Yes, sir.

Q. Will you tell the Court why you recommended that Mr. Hoagland receive the route, and his bid be accepted, as against the bids of the other drivers?

A. Well, it happened to be that there was some younger boys had been on the route, and I didn't think they were capable of driving that distance, that Hoagland was at one time in the country, and I figured he could get the truck there and back until Oliges did get back.

Q. Do I understand you to state that the reason was that

Hoagland could handle a truck, drive it over country roads, whereas you feared the other boys could not?

A. That is absolutely the reason he got the route.

Q. Now, where did the Shephardsville and Suburban route run to?

A. From Okalona to Shephardsville, including Shepardsville across and the suburban part of it is the outer belt of Third Street, Simms Corner, if you are familiar with that part, the outskirts of Louisville, all the way around to Mannship Road.

Q. Mr. Sheehan, approximately how many miles would it be necessary to drive on that route in order to cover it? How many miles would it be necessary to drive a day?

A. One route would be around 22 miles and the other would probably be a little less, but they are both hard roads to travel.

. . . . . .

Q. (By Mr. Skaggs) Mr. Hoagland drove this route approximately six weeks, is that correct?

A. Right around that, six weeks, I would say.

Q. What was the character of Mr. Hoagland's services that he performed; and will you relate to the Court any incident that occurred during that six weeks of his employment on that route of which you have knowledge.

A. Well, as a man takes over a new route, it is customary that the route manager goes with him and shows him the stops and shows him how to make the stops and how often to make the stops, and I went with him; I am most sure it was a Wednesday and a Thursday, and through the route I told him what to make and particularly I told him the stop which was called, if you want the name, Parkside Inn, which practically carries the route. In other words, it is the biggest stop on the route. I distinctly hold Hoagland that that was a four times a week stop, that he must make that man Monday, Wednesday, Friday and Saturday, because he has a good weekend business; so he says, "All right, I will make it." I was with him on a Thursday, and I reminded him again on a Friday to be sure and make that stop again Saturday. He said he would. So, the first trip—that was two days after I left him—he did make it, but the following week, Hoagland comes in about, I would say 1:00 o'clock, off his route, and which you are allowed to go home at 2:00, and here, later on in the evening, the man called from this Parkside Inn, saying, "The Cola Cola man wasn't here yet," and the dispatcher got hold of me and asked me how come

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the Parkside Inn wasn't made. I said, "Well, I told Hoagland to make that thing every Saturday, along with Monday, Wednesday, and Friday deliveries." That's the way its been made, the route book shows it has been made that way, and he had been told it should be made that way, and Hoagland, having gone home, we had to get a man and send him out there and pay him overtime, because it was late in the evening when he called.

Q. Did you speak to Hoagland about that?

A. I told him about that the following Monday. He came to work and I met him out on the route and I said, "How come you didn't make Parkside Saturday?" and he said he forgot. * * *

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* * * And, there was at that time, Blue Lick Road, which is closed to commercial traffic, heavy traffic through the Fall, you know. You know what we had back there in March and April, and it was a penalty in law to drive a heavy truck over it; and I told Hoagland, "Every other week I will meet you here,"—it was on Preston Street I would meet him,—"and take and put the Coca Cola in my coupe, and take it back there with you."

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So, I made arrangements for him the first trip and he met me there and we took the Coca Cola back. So, two weeks came up again, and I says, "Well, Hoagland, I will meet you out there at 12:30." Well, I told him that on a Wednesday, and I told him again on a Friday, I think it was I saw him, "I will meet you out there again tomorrow. What time would it be convenient for you?" and he said, "Well, I should be through there about 12:30." So, I says, "Okay, I will be there, waiting for you." So,

I gets there about a quarter of twelve, and there was a lunch stand there where I was to meet him, and a place to park the truck, and we was to put the Coca Cola in the truck, into the coupe and take it over this restricted road, and I got out there and I ate lunch out there, waiting for Hoagland, and there was two ways that you could come, you can come Preston Street or else you could come around the detour, which he was accustomed to coming, and meet me there at 12:30. Well, I waited until 12:30 and I went in and asked the man again, "Are you sure the Coca Cola man made you today?" and he said, "Yes, he made me, he made me earlier." So, apparently, he made him in the morning, and I says, "Well, I am supposed to meet him here and take him over there to Markets' Grocery." and I waited and waited and it come on to 2:00 o'clock and I still waited, and I waited until 3:00 o'clock, so I thought, "Well, there must be something wrong," so I calls up the Company and who is done in but Hoagland. * * *

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Q. (By Mr. Skaggs) Mr. Sheehan, did I understand you to say it was prohibited to operate a truck over Blue Lick Road at that time?

A. It was prohibited at that time to operate a heavy truck over Blue Lick Road, because it was full of chug-holes and stuff, and I imagine if the State would have caught him, or the County, whoever had charge of that road, they would have probably fined him or us, one, and probably make him pay a little bit on the reconstruction of that road, which was being reconstructed.

Q. Did he take the Coca Cola truck over the road?

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A. He took the Coca Cola truck over the road, and that

was overriding my orders in telling him I would wait for him and take them over there for him.

Q. Did you remonstrate with him about that conduct; did you speak to him about it?

A. I told him that was a hell of a note to keep a man waiting, especially when he made that engagement, he could have at least waited there for me and told me he went over, or else come back that way and told me, but having a man sitting out in March weather like that is not very comfortable, sitting in a car in the cold, and also with a storm coming up which it was coming up, and that kind of put me three hours late on my duties which I did have.

Q. Well, now, during this six weeks' period that Mr. Hoagland was running this route, this Shephardsville and Suburban route, were the sales of Coca Cola up or down by way of comparison?

A. By way of comparison, yearly sales, they were down.

Q. Did that condition exist during the six weeks' period that he had the route?

A. It did. It was down the six weeks he had the route.

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Q. What were Hoagland's habits relative to getting in early when he was running this particular S & S route?

A. Well, that is what I kept asking the same of the sales manager. It seemed to me that the boy before him was an awful good boy, and he probably never would have quit but he did have a bad back, but that boy always told me he couldn't get in off that route in less than three, 3:30, 4:00 o'clock, and on good days, he couldn't make it before 5:00. And, Hoagland, it would seem he would get that thing done at 12:30, 1:00, 1:30 or almost 2:00 at the latest;

and following right back when Oliges came back, he started on that route and the sales picked up again, and Oliges don't seem to be able to get in, like the first boy.

. . . . . .

Q. (By Mr. Skaggs) Mr. Sheehan, did you have a cooler campaign that was on on that S & S route during the time Hoagland was running it this six weeks' period?

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A. We had a cooler contest, plantwide, in which we have almost annually, for the past couple of years, and the way it is run, you sell the coolers, that is the route salesman is actually the boy that is supposed to get the prospects and try to sell the coolers, and which the route manager in turn does help him with his prospects, tries to close the deals, in which we close all deals on coolers. The rest of my boys seemed to be doing all right, and Hoagland's route was the route that should have sold pretty good on coolers, but it so happened in the time I had Hoagland, there was two coolers sold on that route, and which he didn't know nothing about until they were delivered in the store, he walks in the store and sees them, he gets credit for that; and I told him when he went on there, I also told him there was a cooler contest, I said, "This is a good territory for you to build up on coolers." He actually said he would, and which he give me a wild goose chase one time, all the way out to Shephardsville on a cooler, and the man didn't know nothing about it; he had never talked to him about it. He give him to me as a prospect. That is after I sold them two coolers, and told him to get busy and get some coolers sold on that route. I told him I knew there could be some sold.

Q. Now, Mr. Sheehan, did you from time to time, as these various things occurred, report them to Mr. Will

Miller, the sales manager of the Company?

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A. I did off and on, yes, sir. I keep track on all my men, and tell Mr. Miller whether they are going good or whether they are doing not so good, and I told Mr. Miller that Hoagland wasn't going so good.

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Q. Now, leaving Mr. Hoagland, do you know Frank Kamenish?

A. I do.

Q. He did not work under you, you were not his supervisor, were you?

A. No, sir, he was under another fellow.

Q. I direct your attention to May 5th, 1951, which was a Saturday, and I believe Derby Day, and I ask you if you were in the office or came into the office of Mr. Miller at the time he was giving—having a conversation with Mr. Kamenish.

A. I went in there at the time he was having a conversation with Mr. Kamenish, yes, sir.

Q. Will you tell the Court what portion of that conversation you overheard, what Mr. Miller said to Kamenish and what

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Kamenish said to Miller?

A. Well, as I came in, I heard Kamenish say, "Well, Will, suppose you put it down that I quit, because I am going to take a couple of weeks cruise and I am probably going into the Navy, anyhow. If I don't, I think I will look around a couple of weeks and then look for another job." And Mr. Miller in turn told him, "Now, you know if you quit now, you are not liable—you are not supposed to try to draw any unemployment compensation because you

quit." He says, "Yes, I understand that; just put it down that I quit."

Q. Then what happened? Was that all the conversation you heard?

A. That is all I heard.

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Cross-examination

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Q. Now, this Parkside Inn, you say Hoagland failed to make it the week after he started the route?

A. He made it the first trip.

Q. The second trip he failed to make it?

A. The second trip he failed to make it.

Q. That would be sometime in March?

A. Roughly. I wouldn't say the date, but it would be somewhere in there.

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Q. (By Mr. Kimmell) Did he ever fail to make this Parkside stop again, outside of this one time?

A. No, because I kept on him to make it every trip.

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Q. Now, is there a heavy season or a light season for the sales of Coca Cola?

A. There is.

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Q. Yes, what time of the year is the light season?

A. Wintertime is the light season.

Q. What months would that be?

A. Well, no particular months, just wintertime. It is

different. Maybe it would be warm in December and it would be a good month; maybe it would be cool in December and it would be a bad month. It is all according to the weather.

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Q. Do you remember what the total sales on the S&S route were for January?

A. I couldn't recall that right off.

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Q. For March?

A. I couldn't recall that right off.

Q. Well, how are you able to say that Hoagland's sales were 8 percent down?

A. I would say roughly.

Q. Roughly?

A. Well, I was looking at it a couple of weeks ago.

Q. From what?

A. From the previous year.

Q. The previous year?

A. That is right. We mount our sales month against month of the previous year, and also yearly. We go to that two or three ways sometimes.

Q. Isn't it usual for sales to be down when a new driver takes over?

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CARL BUNNING, SR., a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Testimony of Carl Bunning, Sr.

Direct Examination

Q. (By Mr. Skaggs: You are Carl Bunning, Sr.?

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A. Yes, sir. I am not "Senior", I am Carl H. Bunning. We don't have a Junior or Senior. They call it that, but it is not a Junior.

Q. How old are you, Mr. Bunning?

A. 44.

Q. How long have you been employed at Coca Cola?

A. 23 years.

Q. You are, at the present time, a route manager, are you?

A. That is right.

Q. How long have you been a route manager?

A. Approximately three years.

Q. Prior to that time, what position, or positions, did you hold with the Coca Cola Bottling Company?

A. Driver-salesman.

Q. Mr. Bunning, you were the supervisor of Frank Kamenish, were you not?

A. That is right.

Q. You also were the supervisor, or manager, of James Lueke?

A. Yes, sir.

Q. What route did Mr. Kamenish have during the period of time you were his supervisor?

A. West Central 3.

Q. Mr. Kamenish has testified that, about a week following a Company meeting at which Mr. Schmidt spoke, and which was held about April 25th, that you saw him while he was running

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his route, and inquired of him if he had gone to the union

meeting, and if he had signed a card with the union. Will you tell us whether or not that occurred, or you had such a conversation with Mr. Kamenish?

A. That is untrue. We did talk in a casual sort of way about different things. In other words, he brought it up, but there was nothing in that about where I asked him about a card or if he had went to a union meeting.

Q. Do you recall what your conversation was, Mr. Bunning?

A. Yes, in so many words, I told him to think, to use his own mind and think both sides, and to make up his own mind just which side he would like to be on, that is all.

Q. Did you indicate to him that you thought the Company's side was the better side?

A. No, I didn't. I didn't indicate anything. I wanted him to make up his own mind on the thing.

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A. Mr. Schmidt told me to keep hands off, that anything that the fellows thought about the union, whether they wanted to be for the union or against it, either way, that it was perfectly all right.

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Q. Now, Mr. Bunning, Mr. Kamenish stated that you came out to see him on his route. Will you state to the Court what your duties are, generally, in the supervision of the routes that you have charge of?

A. Well, at various times we talk to all drivers, that is, that are under my jurisdiction, about changes in stops and numerous other things that come up that the driver doesn't know about or wants to know about; I mean—

Q. I mean, physically out over the route.

A. You mean—

Q. Do you have to go around over the routes?

A. Yes.

Q. Do you see your route salesmen from time to time out on the routes?

A. Yes.

Q. Now, do you recall an occasion at Mr. Coogles' place at 10th and Broadway, I believe, an occasion where he didn't get some Coca Cola, or refused to get some Coca Cola, or refused to keep some Coca Cola?

A. Yes.

Q. Will you tell the Judge about that situation?

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A. Well, anyway, after I got there, I talked to Mr. Kamenish about it.

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A. And I asked him why Mr. Coogle could not get any Coca Cola. He said, "I am not going to haul those cases up over

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that snowbank and into there," so Mr. Coogle told Mr. Kamenish if he didn't want to leave him any Coca Cola, just to go on back to the plant, he didn't need it. So that were the words that were used there.

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A. I heard Mr. Coogle say that, the last part.

Q. (By Mr. Skaggs) Well, then, what happened, Mr. Bunning?

A. Well, then, in the meantime, Mr. Kamenish had pulled off, so I went and—

Trial Examiner Ferguson: Well, I thought he was there, Mr. Coogle was saying this to him in your presence.

A. He was, but he went on out then and got on the

track and pulled away; and I went after him and told him that he would have to make Mr. Coogle, so he came back, very mad about it.

Trial Examiner Ferguson: He came back right away?

A. Well, in two or three stops. I waited there for him and helped carry in the cases.

Q. (By Mr. Skaggs) Mr. Bunning, did you report that conduct to Mr. Miller?

A. I did.

Q. Now, tell us, if you will, what was Mr. Kamenish's conduct with reference to garbing himself in proper uniform?

A. Well, Mr. Kamenish never like to wear the full uniform.

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We had various times that we had to talk to him about it, and in fact, one time I went to a girl in the front office and asked her if we had any used jackets, which I got for Mr. Kamenish. He was always in the habit of wearing a baseball cap, some sort of jacket that wasn't a Coca Cola jacket, and in many cases, a shirt that was of a plaid, or of some other nature, that wasn't a Coca Cola uniform; and so I told Mr. Kamenish several times about it, and it seemed like it made little difference to him, so I thought I would do him one favor, I would get him a jacket, so I did.

Q. You mean at no expense to him?

A. Sir?

Q. At no expense to him?

A. That is right. It was a used jacket.

Q. Did he wear it then?

A. Yes, he did.

Q. How many occasions would you say that you saw Mr. Kamenish out of uniform?

A. Well, I have no idea of the times, but I would say,

safely, 25.

Q. And on each occasion you would speak to him about it?

A. Not on every occasion, no, but I would say the biggest part of those occasions. There were lots of times I probably wasn't around to see him.

Q. And he just kept on doing it?

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A. That is right.

Trial Examiner Ferguson: What did he say?

A. Well, he would use different excuses, that he couldn't get a jacket, or he couldn't get a shirt, and the caps were all of a different size, and he would give some sort of an excuse like that.

Trial Examiner Ferguson: Well, was that true or do you know?

A. I don't think it was true.

Trial Examiner Ferguson: Did you look to see, or inquire?

A. No, not on the cap business.

Trial Examiner Ferguson: Whether they had in stock, any of those sizes that he was complaining about?

A. Well, that is a far different department. He could have went to the girl in charge and found out.

Trial Examiner Ferguson: You didn't go to her and ask her?

A. No, only for the jacket.

Q. (By Mr. Skaggs) You didn't have any trouble finding a jacket to fit Kamenish, did you?

A. No, I didn't.

Trial Examiner Ferguson: You say that was a used jacket, though?

A. That's right.

Q. (By Mr. Skaggs) What was Kamenish's conduct

and attitude

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towards the Company sponsored selling courses and route salesmen courses?

A. Very poor.

Q. Well, now, tell us in what respect it was poor?

A. Well, he would set near the back of the room, and would be cutting up or talking or some sort of thing with someone around him, disrupting them, and of course, not paying attention himself. Then, after the meeting would be over, going out, he would make some sort of a remark to somebody else about it and about that those training courses weren't for him, or some sort of a remark of that kind.

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Q. (By Mr. Skaggs) Tell us what he did say, in your own words, Mr. Bunning, if you can, rather than in mine.

A. Well, he would say in so many words, "Those meetings are a lot of bunk, I don't see why we have to stay around here until 4:00 o'clock and listen to that stuff and see those films." That's the way he would say it.

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Q. Mr. Bunning, James Lueke is one of your route salesmen at the present time, isn't he?

A. Yes.

Q. He has testified that you asked him if he attended the

527

union meeting. Did you at any time question him as to whether or not he had attended a union meeting?

A. I did not.

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Q. Do you recall any conversation with him at any time in which unions were mentioned?

A. Yes, I told him the same as I told Kamenish, to weigh both sides and make up his own mind.

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Q. What was the occasion for that conversation arising, do you recall?

A. Well, there was some talk around the plant about the union, and things of that sort, like, I guess there always is in those places, and a lot of the fellows had expressed a desire to get off the union side and possibly get on the Company's side, and I thought maybe by talking to a fellow, that I could help him out in some way, not hinder him.

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Q. Now, with reference to driver salesmen, will you state what period of time the driver-salesman is on probation after he is employed?

A. One year.

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Cross-examination

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A. Well, because it was brought up in the conversation a lot of times.

Q. With him?

A. Yes, sir.

Q. Who brought it up?

A. Mr. Kamenish brought it up.

Q. What did he say?

A. He wanted to know how the union was coming along.

Q. You mean he asked you how the union was coming along?

A. That is right.

Q. Did James Lueke ask you how the union was getting along, too?

A. No, James Lueke didn't.

Q. How did the union come into the conversation?

A. Well, I was talking to him and the conversation came up about unions, again.

Q. Who brought it up?

A. Well, I did.

Q. Why did you bring it up?

A. Well, I just thought maybe there was something on his mind; he is sort of a new fellow.

Q. You thought the union might be on his mind?

A. Well, possibly, and possibly not.

Q. Did you go around to any other employee and talk to them about the union?

A. Yes, I have talked to lots of them.

Q. About how many?

A. Well, I don't know how many, I don't have no exact number.

Q. Well, I mean, a lot of your route salesmen?

A. Of my own men.

Q. What did you tell these men?

A. The same story, to use their own noodle and think about the thing.

Q. Did they bring up the subject of the union or did you?

A. Some of them did, yes.

Q. Those who brought up the subject of the union, how come they brought it up, what did they actually want to know?

A. Well, a lot of them will ask you the question, "How is the union coming along?" or "What are they doing down at the plant?" or something like that, just a general conversation. We often talk to men in general conversation.

Q. They ask their supervisors how the union is getting along?

A. That is right. They have, I hope, confidence in me.

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Q. (By Mr. Kimmell) This time that Frank Kamenish had the difficulty with Coogle, what month was that?

A. Well, I don't know the exact month.

Q. It was sometime during February, wasn't it?

A. There was lots of snow, I do know that; that was last year.

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Trial Examiner Ferguson: You used the term "last year". I don't know whether you meant last winter or last year.

A. That would be in '51, I would say. It was sometime towards—

Q. (By Mr. Kimmell) Beginning of the year?

A. Yes, that is right.

Q. How is it that you came over to Coogles'?

532-A

A. Through a call that Mr. Coogle put in himself.

Q. Well, who told you to go to Coogles?

A. Mr. McHugh.

Q. And when you arrived at Coogles', was Kamenish still stuck in his truck?

A. He was in his truck.

Q. Was his truck stuck?

A. No, it was ready to go. The mechanics had got

there and fixed it. I don't know just what was wrong with it.

Q. Well, was he stuck in the snow?

A. No, he wasn't stuck in the snow.

Trial Examiner Ferguson: They had already pulled him out, hadn't they?

A. There was something wrong with the truck. He couldn't get out.

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Q. How far down from Coogles was he at that time?

A. Right in front of it. The truck was right out the front door from Coogles'?

Q. What was Frank doing?

A. Frank was sitting in the truck at that particular time.

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A. I told him, I said, "Why is it, Frank, that you can't make this stop?" He said, "I am not going to pull that hand-truck up over that damn snow." I said, "I don't see why you shouldn't, you have got the stop to make and you have made a lot of stops that is just as bad as this one, why get so heated up about this?"

Q. What happened?

A. So, I went on in to talk to Mr. Coogle.

Q. Did you tell Frank to make the stop?

A. I told Frank to, yes, but then he pulled on out, they pulled him on out.

Q. Then they pulled him out?

A. They pulled him out of there.

Trial Examiner Ferguson: I thought he was out when you got there?

A. No, he was still parked in front of the stop when I got there.

Trial Examiner Ferguson: Well, his truck was still stuck,

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was it?

A. Well, now that, I don't recall that technical part about it, whether the truck was still stuck or not, but I know he did call the mechanics and they came over there to pull him out.

Q. (By Mr. Kimmell) Were there any mechanics on the scene when you arrived?

A. That I don't know, just off hand. I didn't go into any detailed things about it.

Q. Well, anyway, you walked in and they pulled Frank out, is that your story now?

A. I went inside and talked to Mr. Coogle.

Q. And in the meantime, they pulled Frank out?

A. Pulled him across the street onto drier ground, or less ice, I maybe should say.

Q. And how far away was he from Coogle's at that time?

A. Well, from the distance from one side of the street over to the other side of the street.

Q. That is Broadway?

A. That is Broadway. Well, it would be the distance of 10th Street. He was on Broadway.

. . . . . .

Q. Now, Broadway is a pretty busy thoroughfare, isn't it?

A. Well, yes.

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Q. So from where they pulled Frank to the spot where they pulled Frank, it would be very difficult to deliver Cokes, wouldn't it?

A. I don't see why not.

Q. Well, he would have to cross 10th Street, wouldn't he?

A. Well, yes, we cross a lot of streets.

Q. With the hand truck?

A. Yes.

Q. And there is a constant stream of traffic along Broadway, is there not?

A. On Broadway, but that doesn't affect 10th Street.

Q. You went in to speak to Mr. Coogle?

A. Yes.

Q. Where was Frank when you came out?

A. Frank was going up the street and I caught him.

Q. What did you say to Frank?

A. I told him, "You will have to make Mr. Coogle."

Q. What did Frank say?

A. He used a lot of riff-raff words about Mr. Coogle, and I said, "That doesn't make any difference, Frank, you have still got to make him; so you come on back around and make him."

Q. And did he?

A. Yes, after he made a couple more stops on down Broadway, I don't know just how many it was, but I will say two more

stops, and he came around and I helped him carry the cases in myself.

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Trial Examiner Ferguson: You say that is all you did tell him?

A. Well, yes.

Trial Examiner Ferguson: I thought you said awhile ago he could have trucked them right across the street.

A. He could have, he could have did that. Of course, I didn't get right down and say, "Get those cases off the

truck and truck them over here," I didn't say that, but he could have did it, we truck them half a block down streets.

Q. (By Mr. Kimmell) There was a lot of snow on the ground then, wasn't there?

A. Yes, it was banked high.

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Q. I wasn't going to hold you to it. Now, when were these 25 times that you saw Kamenish without a uniform?

A. At various times on the route, in the plant, at sales meetings.

Q. And then you got him a jacket?

A. That is right.

Q. Now, when did you get him a jacket?

A. Well, I don't recall the date of that.

Q. Was it in the early part of the year? It probably was, because it was warm.

A. It was probably in the Fall of the year, I don't know just exactly when it was.

Q. The Fall of the year?

A. It was cooler weather, I know, I don't recall any certain date.

Q. After you got him the jacket, did he wear it?

A. Yes, he did.

Q. And well, that is right, but then the plant shirts and stuff like that were still there? All right, now, when is the last time you saw him wearing a baseball hat?

A. Well, he discontinued wearing the hat, the baseball cap,

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and went around with just his hair, we will say.

Q. Was that—

A. Which was all right.

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Testimony of Carl Bunning, Sr.

Q. (By Mr. Kimmell) His employment was terminated—he either was fired or resigned—sometime in May, was it not?

A. He quit in May.

Q. He quit in May? How long before he quit did he quit wearing that baseball cap?

A. It was—that is an uncertain figure that I would give you there; I wouldn't know.

Q. Was it a month, two months?

A. I couldn't tell you, I don't know, I just seen him at various times with that cap on.

Q. When was the various times?

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A. All during his time of employment.

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Q. Did you ever see anybody else wearing baseball hats?

A. Yes, * * * *

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Trial Examiner Ferguson: Yes, he may explain his answer. Go ahead.

A. But no more than we see them wearing one, the same is said to them that is said to Kamenish.

Q. (By Mr. Kimmell) Kamenish wasn't the only one wearing a baseball cap?

A. He was the worst, I would say.

Q. Now, when was this sales meeting in which Kamenish behaved himself poorly?

A. We had various sales meetings, there was no particular one that I could cite; we had been having various meetings.

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Q. Did he behave himself poorly at every sales meeting?

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A. I couldn't say that, because I didn't see him at every sales meeting.

Q. But those you saw him at, did he behave himself poorly?

A. Not all of them, no, I wouldn't say all of them, but most of the time, I would say.

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Q. Under Miller's orders. How many times did Mr. Miller tell you to talk to him?

A. Well, we talked about it one time, Mr. Miller and I did,

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and of course, lots of times I would say something to him about it myself, without maybe saying anything to Mr. Miller about it, but on this particular case of where he made the remark, I did say something to Mr. Miller about it.

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Q. Have you any idea when you talked to him, the times?

A. No, I don't. I talked to so many men in a days' time.

Q. I know it is hard to remember, but it is pretty important. See if you can get it in your mind when it was, the Winter, Fall, Spring, or what.

A. I don't know that. It was probably more or less in the Fall, because we hold our sales meetings at that particular time.

Q. It was sometime during the Fall?

A. I would say that. I am not positive of it, though.

Q. That would be the Fall of 1950?

A. I would say that.

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JOHN E. McHUGH, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Glenn) State your name and address, please.

A. John E. McHugh, 104 Boston Court.

Q. Mr. McHugh, where are you employed?

A. Coca Cola Bottling Company.

Q. And what is your position with Coca Cola Bottling Company?

A. Traffic manager.

Q. Were you in the employ of the Company during March and April of 1951?

A. Yes.

Q. How long have you been in the employ of the Company?

A. 19 years.

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Q. (By Mr. Glenn) Mr. McHugh, were you acquainted with Delmar Hoagland?

A. Yes.

Q. And he was employed as a route salesman?

A. Yes.

Q. Do you know the approximate date of the termination of his services?

A. Well, that was about April.

Q. Do you know what way—what route he had at that time?

A. Shephardsville and Suburban.

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Q. Mr. Hoagland testified in this case that approximately a week or so before his services were terminated, that you were present when he had a conversation with William Miller?

A. That is right.

Q. Is that correct?

A. Yes.

Q. Where was that conversation?

A. In my office.

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Q. (By Mr. Glenn) Mr. McHugh, did you hear any conversation

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between Mr. Miller and Mr. Hoagland, with reference to the return of Mr. Oliges?

A. Yes.

Q. To employment in the Company?

A. Yes.

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Q. What was the substance of the conversation?

A. Well, Mr. Miller told Hoagland that Oliges was coming back out of Service, and that Hoagland, if his work improved, he would be put on another route, East Central 2, I believe it was.

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Q. Is that the route that he was on before he went on the S & S?

A. Yes, that is right.

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Q. Was anything said about what the pay would be?

A. Not as I reme ber, there was no talk of pay at all

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Q. Has the Company ever paid the base pay of a "C" route to a person who is working on a "D" route?

A. No.

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Cross-examination

Q. (By Mr. Kimmell) Mr. McHugh, this conversation that you overheard between Mr. Miller and Mr Hoagland, now when was it

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that this took place?

A. I am not sure of the date.

Q. Well, was this when Bobby Oliges was supposed to come out of the Navy?

A. Yes, just prior to that.

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Q. (By Mr. Kimmell) All right, I will put it another way. Hoagland got the Shephardsville and Suburban route in March of 1951, didn't he?

A. That is right.

Q. Now, the conversation you are talking about was not then?

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A. No.

Q. After he had been on the route a few months?

A. A short while, yes.

Testimony of John E. McHugh

Q. And after the Company heard that Oliges was coming out of the Navy?

A. Yes, he was on the route when I heard then that Oliges was coming back, yes.

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Q. Wasn't this right before Oliges came back?

A. Mr. Miller told Hoagland that Oliges was coming back, and as I remember, there was no specific set day, and that is if his work improved, why, he would go on East Central 2 route.

Q. Do you know how long after this conversation about which you were talking, that Hoagland was fired?

A. No, I don't.

Q. Wasn't it about a week later?

A. Well, approximately, something like that, I am not sure.

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IRWIN F. HARTMANN, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Glenn) What is your name, please.

A. Irwin F. Hartmann.

Q. Where do you live?

A. 1632 Jaeger Avenue.

Q. Are you employed by the Coca Cola Bottling Company?

A. Yes, sir.

Q. What is your position there?

A. Route manager.

Q. Well, how long have you been a route manager?

A. About three years.

Q. How long have you been in the employ of the Company?

A. I think it will be 19 years in April, or May.

Q. Mr. Hartmann, do you know a Mr. Yeager who is in the employ of the Coca Cola Company?

A. Yes.

Q. Did you ever hand to Mr. Yeager a paper for signature by Mr. Yeager or anyone that might desire to notify the union or any other labor organization, that they didn't care to be

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represented by them?

A. Why, I had a statement, but I don't recall what, exactly, was on the statement. I gave it to Mr. Yeager, and told him that if he wanted to sign it, or any other fellows wanted to sign it, they could do so. Several of the fellows had asked me about it, so I let Mr. Yeager have the paper.

Q. When was the occasion of your handing that to him?

A. Oh, I just more or less had the paper and gave it to Mr. Yeager and told him if he wanted to sign it he could, and if anyone else wanted to, they could.

Q. Had any employees come to you and stated to you that they would like to sign something of that sort?

A. Yes, sir, they did.

Q. Were they non-supervisory employees?

A. Yes, sir.

Q. And it had been indicated to you that several of them might want to, indicated that they did not desire to be represented?

A. That is right, yes, sir.

Q. Now, when you handed this to Mr. Yeager, did you

tell Mr. Yeager he had to sign it?

A. No, I did not. I said if he wanted to he could; if he didn't; he didn't have to.

Q. Did you tell him he had to get other people to sign it?

A. No, sir, I told him if anybody wanted to sign it, why,

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to give them the paper.

. . . . . .

Q. Did Mr. Yeager return the paper to you?

A. It was hanging on my file a day or two later.

. . . . . .

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Cross-examination

Q. (By Mr. Kimmell) Now, you say a number of employees came to you and said they would like to get out of the union?

A. Yes, sir.

Q. Do you remember who they were?

. . . . . .

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A. One of the fellows, he is a personal friend, said, "Don't mention my name", and the other fellow said he wanted some information, and I promised them that I wouldn't involve their names. I made the promise to the fellows in these respects.

Q. This one fellow?

A. Well, there was two in that one day.

Q. How many others asked you?

A. It could have been maybe one or two other ones, as time went on.

Q. Who were they?

A. Well, I decline to give their names.

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Q. (By Mr. Kimmell) Was one of these people Yeager?

A. No.

Q. All right, what—why did you give the paper to Yeager, instead of to one of the persons who asked you that they wanted to get out of the union?

A. Because I happened to see Yeager first.

Q. Well, why did you choose him? He didn't ask you, did he?

A. No, but he happened to be up there when I had the paper. He was up in the cash-up room.

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Q. Did you tell Yeager to return the paper to you after he got it signed, if he got it signed?

A. Yes, I believe I told him if they signed the paper, and if they didn't, why, he could give the paper back to me, I didn't say hand it to me, I said, "Get it back to me."

Q. What were you going to do with it?

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A. Well, I would have turned it back to the office.

Q. (By Mr. Kimmell) By "the office", who do you mean?

A. I probably would have gave it to Mr. Miller or Mr. Schmidt.

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Examination

Q. (By Mr. Trial Examiner Ferguson) Well, I want to

ask you a question: Who wrote that paper?

A. I don't know.

Q. Well, where did you get it?

A. I got it laying on the desk in the sales department.

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Q. And the first time you ever saw it, it was just lying there on your desk, somebody had written it up?

A. Well, I had signified to Mr. Miller that some of the fellows had come to me about getting out, wanted to see if they could do something that way, didn't want to be involved in any union activity, and he said, "Well, we will see what we can do about it," and then in a couple of days I asked him about it, and the paper was laying on the desk, and I took the paper.

Q. And instead of giving the paper to these people who asked you, who had spoken to you, you gave it to Mr. Yeager, who had never spoken to you about the matter, is that right?

A. Yes, sir, because that was in the afternoon, and Mr. Yeager was the only one in my group that was upstairs, that's why I gave it to him.

Q. Did you tell Mr. Yeager that certain fellows had spoken to you and wanted to sign the paper?

A. Yes, sir, I told Mr. Yeager that some of the fellows taken it up with me and said that they wouldn't want anybody else to represent them, and so I had a statement, and he could do whatever he wanted to—if he signed it, it would be all right, and if he didn't, it was all right, and if anybody else wanted to sign it, why, he would have the paper.

Q. Did you give him the names of these men that said they already wanted to sign something?

A. No, sir, I was route manager in my particular group, and

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they all know that I happen to be the route manager in that group, and that is the fellows I deal with.

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Q. Where is that paper now?

A. Well, that, I don't know. It was hanging on my file for a couple of days, and it disappeared, and I don't know what happened to it.

Q. You didn't return it to anybody?

A. No, sir.

Q. It appeared on your desk?

A. Yes, sir.

Q. And it disappeared from your desk?

A. That is right, from the file.

Q. And you don't remember how it read?

A. Right offhand, no, I couldn't give you the exact words.

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Q. Do you feel like you could give the substances, or not?

A. I think it said, "I don't want to be represented by any organization," or "any outside organization."

Q. Well, did it have any names on it when it came back?

A. No, sir.

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Recross-examination

Q. (By Mr. Kimmell) All right, Mr. Hartmann, I believe you stated that you discussed the matter with Mr. Miller about the petition?

A. Well, I just told him the fellows that way, asked me about it.

Q. And the next thing you knew, there was the petition, all prepared?

A. Well, it was several days later.

Q. Several days later?

A. Yes.

Q. Who prepared it for you, do you know?

A. No, I don't.

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Examination

Q. (By Trial Examiner Ferguson) Was it typewritten?

A. Yes, sir.

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GEORGE CLARENCE SARGEANT, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. Glenn) State your name, please.

A. George Clarence Sargeant.

Q. Where do you live, Mr. Sargeant?

A. 815 South 35th.

Q. Are you employed by the Coca Cola Bottling Company?

A. Yes, sir.

Q. What is your position?

A. I am foreman in the basement.

Q. How long have you been employed by the Company?

A. 18 years.

Q. Do you know Thomas Brooks?

A. Yes, sir.

Q. Was he in the employ of the Company during 1951?

A. Yes, sir.

Q. Do you know when his employment with the Company was terminated?

A. Well, not exactly, no.

Q. Approximately, do you know the approximate date?

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A. Well, I never kept track of that. It's not been very long, but I think around March or April.

Q. Was it in the Spring of 1951?

A. I think so.

Q. Do you know the reason for the termination of his employ?

A. Why, he would go away from his machine a whole lot, and he would go into the restroom about 20 or 30 minutes before time, and I would think that would create a morale between the employees, the others thought they could do the same, and he was warned about that, and he was warned about his smoking, and he acted sullen whenever I would ask him whether he didn't want to work a little longer, he would say no, and which would make the other boys wonder why he wouldn't have to work and they did. Then, I asked him one time why he don't work, and he said, "You don't ask me." I asked him and he said no again, so he just acted so sullen, and I wouldn't ask him any more. And such things as that, come up, and he just disturbed the morale and I talked to Mr. Ferst about it.

Q. Thomas Brooks was under your immediate supervision, wasn't he?

A. Yes, sir.

Q. And you discussed these matters with Mr. Ferst?

A. Yes, sir.

Q. Was Mr. Ferst the plant manager?

A. Yes, sir.

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Q. Would you say it was in April or May, Mr. Sargeant?

A. The latter part of April, I think.

Q. Now, when had you previously discussed these matters with Mr. Ferst?

A. On several occasions.

Q. Did you have there in the plant any no smoking rules?

A. Yes, sir.

Q. What was the no smoking area?

A. In the basement there is no place, that is, no smoking over the whole plant, but there was to be no smoking in the basement.

Q. Did that also include the locker room?

A. Yes, sir.

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Q. Did you ever permit people who worked there to violate the no smoking rule?

A. Why, I have caught some of them, and reprimanded them, told them they were breaking the rules, and if they continued, there was liable to be something done about it, yes, sir.

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Q. Now, did you have occasion to talk to Thomas Brooks?

A. Yes, sir.

Q. On few or many occasions?

A. On many—well, several occasions I have talked to him about his smoking.

Q. Had you warned him several times?

A. Yes, sir.

. . . . . .

Q. No, I am not asking you if you remember the day, I am asking you if you remember the circumstances, what took place on the day he was fired?

A. No, I don't.

Q. Well, did you catch him smoking on that day?

A. I don't know.

Q. Well, was he away from his machine that day?

A. Well, yes, he would go away from the machine, quite often.

Q. Well, did you report him to Mr. Ferst that day?

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A. No, not that day I didn't.

. . . . . .

Q. (By Mr. Glenn) Did you discharge Thomas Brooks?

A. No, sir.

Q. Who did?

A. Mr. Ferst.

Q. When was the first you knew about it?

581

A. When Mr. Ferst came and told me I would have to put someone in his place, that he was gone.

Q. What time was that?

A. It was that evening, sometime after he discharged him.

Q. Did that call to your attention anything that Thomas Brooks had done that day?

A. No, not that day.

Q. You had not found him smoking that particular day, is that right?

A. No, sir.

Q. Now, state whether or not Thomas Brooks—what

was the habit and custom of Thomas Brooks in regard to going into the locker room?

A. Why, he would, after we closed down, why, he would clean up and go in the locker room about 20 to 30 minutes before he ought to went in there.

Q. What do you mean by "closing down"?

A. When we cut the machines off, then it takes them a half hour to run out, and during that time they are supposed to clean up their machines, and he would hurry and clean up his machine, and go in the locker room before time, too early.

Trial Examiner Ferguson: Well, what should he have done after he got through cleaning up his machine?

A. Well, he oughtn't hurry and he could have helped outside a while on the runs.

582

Trial Examiner Ferguson: You mean he shouldn't have cleaned it up so quickly?

A. No, he would take his time there and he ought to have stayed out and helped on the runs awhile until time to go home.

Q. (By Mr. Glenn) Now when you say you close down, you mean close down the machines?

A. Yes, sir.

Q. What time do you put the bottles in and start closing down the machines?

A. Well, now, when we quit at 5:00, we close it down, start them out about 20 minutes after.

Q. And what you meant by that is that by the time those bottles run out, then he is supposed to clean up?

A. Yes, sir.

Q. And what are employees' times supposed to be to go in the shower room?

A. Well, about ten minutes to the hour.

Q. About ten minutes to five?

A. Yes, sir.

Q. What time did Thomas Brooks go in there?

A. He used to go in there at 25 or 20 minutes of.

Q. Was that customary with him?

A. Yes, sir.

Q. Did you warn him about that?

583

A. Yes, sir.

Q. Did he stop doing it?

A. No, sir.

Q. Now, did you report that to Mr. Ferst?

A. Yes, sir.

Q. And had you ever talked to Mr. Schmidt about it?

A. No, I talked to Mr. Ferst about it. That concerned me and Mr. Ferst, I thought. I never did talk to Mr. Schmidt that I can remember.

Q. Now, when was there any particular time that it became noticeable, when Mr. Brooks started engaging in this sort of conduct?

A. Yes, since, I judge, last January and February, on.

Q. In January and February?

A. Yes, I think so, yes, as near as I can recollect?

. . . . . .

Q. When you say leaving his machine, how long would he be gone?

A. Well, I wouldn't know. I would go around and wouldn't find him there, and I would hunt him up and tell him to get back on his machine and see where he was at.

Q. Where would you find him?

A. Sometimes in the locker room, sometimes upstairs, sometimes in the back where the runs were, on different locations.

584

Q. Completely away from his machine?

A. Yes, sir.

Q. These were at times when it was not rest period?

A. Yes, sir.

Q. Then on those occasions, did you find him smoking?

A. Yes, sir, I have found him smoking.

Q. And did you warn him about it?

A. Yes, sir.

. . . . . .

Q. But Mr. Sargeant, how was Brooks' attitude so far as obeying your directions and your orders generally?

A. Kind of sullen, sarcastic.

Q. Was that noticeable since about the first of the year?

A. Yes, sir.

Q. I believe you said awhile ago he directly refused to work overtime?

A. Yes, sir.

Q. Did you offer him overtime?

A. Yes, sir.

. . . . . .

585

Q. Now, do you know Mr. McCoy?

A. Yes.

Q. Did he work in the basement?

A. Yes, sir.

Q. Under you?

A. Yes, sir.

Q. Did you ever have any conversations with him about the union?

A. No, sir.

Q. Did you ever have occasion to ask him whether he

belonged to the union?

A. No, sir.

Q. And ask him if he had gone to union meetings?

A. No, sir.

Q. Did you ever threaten to fire him?

586

A. No, sir.

Q. Or lay him off?

A. No, sir.

Q. Did you know whether or not he was a member of the union?

A. No, sir.

Q. Or whether or not he was actively engaged in the organization?

A. No, sir, I don't.

* * * * * * *

588

Q. Did Mr. Schmidt acquaint you with the attitude of the Company with regard to unions?

A. Why, he said it didn't make any difference whether you belonged to a union or anything, that as long as you done right, you had a position there, and not to intimidate or approach them in any way, influence them in any way.

Q. He said that every employee had the right to—

A. Yes, sir.

Q. —join or refrain from joining the union?

A. Yes, sir.

Trial Examiner Ferguson: Did he tell you that?

A. Yes, sir.

Trial Examiner Ferguson: Just individually, or did they have all the foremen, supervisors, together, and say that?

A. No, when he came through, he told me that, not to

say anything.

. . . . . .

589

Cross-examination

590

Q. (By Mr. Kimmell) Mr. Sargeant, when were these times that you asked Thomas Brooks to work overtime that he refused?

A. Of an evening.

Q. I mean, when was it, last Fall, this Winter, or when?

A. Well, while he was employed there, it was before he was discharged, some months before that, and right along.

. . . . . .

Q. And the only times he refused to work overtime was before March?

A. Yes, before he got that job.

Q. Before March?

A. Yes, sir, before he got that job upstairs.

591

Q. Now, when were these times that Thomas Brooks would go into the restroom early?

A. After 4:30.

Q. Yes, I understand that, but when was it, was it before he got the job then upstairs?

A. Yes, sir.

. . . . . .

Q. So whatever happened, happened sometime before March?

A. Before, yes.

Q. Now, when did you talk to Mr. Ferst about Brooks going

592

to the restroom early and refusing to work overtime?

A. Before March.

Q. You wouldn't have occasion to talk to Mr. Ferst about those things after March, would you? I mean, after March, he didn't do those things, did he?

A. You mean after he went upstairs?

Q. You wouldn't have occasion to talk to Mr. Ferst?

A. No, I wouldn't have nothing, he was in a different department.

Q. But employees were permitted to go to the locker room five or ten minutes early?

A. Yes, sir.

Q. And they all did?

A. Yes, sir, unless they had to work overtime.

Q. Yes, sure. Now, this time that Carnie Brooks was laid off a day, for smoking, do you remember when that was?

A. No, I don't keep those dates.

Q. I know. Now, after that, didn't you catch Carnie Brooks smoking again?

A. Yes, sir.

Q. What did you do then?

A. I told him, "You know what happened, and it's liable to cost you something if you continue."

* * * * * * *

593

Q. You told Mr. Ferst about it?

A. Yes, sir, that I caught him smoking.

Q. Again?

A. Yes, sir.

Q. Do you know whether Mr. Ferst did anything about it?

A. No, I couldn't say.

* * * * * * *

Q. Isn't it true, that Thomas Brooks wasn't the only one that was smoking?

A. No, sure.

Q. A lot of them smoked?

A. Yes, a lot of them smoked. They were breaking the rules, if that's what you mean.

Q. Sure. They were smoking all the time, as a matter of fact, except when you caught them.

Mr. Glenn: I object to that.

A. No, sir, they weren't smoking all the time.

Q. But it wasn't unusual for colored employees to smoke down there?

A. Yes, sir.

Q. If they could get away with it?

A. If they could get away with it, they were taking their own chance.

Q. That's right. Thomas Brooks wasn't the only one?

A. No.

Q. Now, how long have you been working for the Company?

A. 18 years.

Q. How long have you been basement foreman?

* * * * * * *

A. Ten years I will say.

Q. And Thomas Brooks has been working there for about nine years?

A. Yes, sir.

Q. And for eight and a half of these nine years that he worked there, was he ever sullen to you, until the first of this past year, did he sass you, or was he sullen to you?

A. Well, off and on he would do these things.

Q. Did he get worse?

A. And then he got worse, yes, right.

Q. Do you know why?

595

A. No, I don't know why.

Q. Did you ever talk to him and ask him why he was going—why he was being sullen?

A. No.

Q. Did you ask him, "Tom, what's wrong?"

A. I asked him why he wouldn't work, and he said he just didn't want to work.

Q. I am talking about his being sullen to you, did you ever take him aside and say to him, "You have been here eight and a half or nine years; how come you are being this way now?"

A. No, sir, I didn't.

* * * * * * * *

Q. (By Mr. Kimmell) Did you take any steps to correct the situation, I mean, his being sullen to you?

A. I told Mr. Ferst about it, and I think he went down, and I don't know, but I think he approached him on it.

Q. Do you remember when you told Mr. Ferst about it?

A. No, I told him on several occasions.

Q. Was that before Thomas Brooks moved upstairs?

A. Yes, sir.

Q. It all happened before March, then?

A. Yes, sir.

596

Q. How about since March, was he ever sullen to you?

A. I didn't have anything—he would get done and go right upstairs, leave, and I would never say anything to him.

* * * * * * * *

597

Q. What would happen if Thomas Brooks walked off for a long period of time?

A. Well, it would just crowd the one man, he—we don't have one man on a machine, it takes two.

Q. So, if he walked off, it would cause a disruption?

A. Yes, sir.

Q. Did it cause any disruption?

A. Yes, sir, sometimes.

Q. What happened?

598

A. He shut off the machine. He couldn't keep up with the machine, keep the feeding up, rather.

Q. Are the men given any time to go to the restroom?

A. Yes, sir.

Q. How much time are they given?

A. Well, they are given a 15 minute period to go to the restroom, that is their regular rest period.

Q. How often is that?

A. Well, they go right on down the line, give each one of them a rest when they want it.

Q. Once a day?

A. That is the regular time.

* * * * * * * *

Q. (By Mr. Kimmell) Once a day rest period?

A. No, they call me and ask me for a relief man, and I furnish them with a relief man.

Q. How often do you do that?

A. Well, sometimes two or three times, it just depends on when they ask me.

* * * * * * * *

599

Redirect Examination

. . . . . .

601

Q. Did you catch any smoking in the locker room?

A. Yes, sir.

Q. Did you see anyone smoking at their machines?

A. Yes, I have.

. . . . . .

Q. You said that—Mr. Kimmell, rather, asked you if it wasn't customary for employees to go into the locker room and take a shower five or ten minutes early. Do you mean by that,

602

that five or ten minutes before five o'clock?

. . . . . .

A. Yes, they were permitted to go in.

. . . . . .

Q. But you didn't mean it was five or ten minutes after the machines shut down?

A. No, sir.

Q. Now, what was he supposed to do there after the machines were closed down?

A. He was supposed to clean up and help around outside until ten minutes of five.

. . . . . .

607

Recross-examination

Q. (By Mr. Kimmell) Mr. Sargeant, after March, when Thomas Brooks was transferred upstairs, he never refused to work after he had cleaned up his machine, did he?

A. You mean upstairs?

Q. No, did he work on the machine until 4:30 and then he would go upstairs?

A. Yes, sir.

Q. After March?

A. Yes, sir.

Q. So there would be no occasion for him to have to work around?

A. No, sir.

Q. So he never refused that?

A. He went up to the other job from there.

. . . . . .

610

Examination

Q. (By Trial Examiner Ferguson) How many times since the first of the year did you find Brooks away from his machine?

A. I found him on a couple of occasions.

Q. Two times?

A. Well, it might be.

. . . . . .

611

Q. Well, was it two times?

A. Well, I will say two times, a couple of times.

Q. You will say two times?

A. Yes.

Q. Are you positive about that?

A. Yes, sir.

Q. When were those two times?

A. During working hours.

Q. I know, but was it last year or this year?

A. Well, I—since the first of the year.

Q. All right. Was it January, February, March, or when?

A. Well, it would be in January and February, along in there.

Q. Well, was it January or February?

A. February.

Q. February?

A. I will say January and February.

Q. Did you report that to Mr. Miller, or Mr. Ferst, whoever is over you?

A. Well, I talked to Mr. Ferst about that, yes.

* * * * * * * *

612

Q. Well, did I understand you to say you found him away from his machine on the day he was fired?

A. No, I didn't.

Q. You didn't say that, did you?

A. No, sir.

* * * * * * * *

613

Recross-examination

Q. (By Mr. Kimmell) After March, after Thomas Brooks was sent upstairs to work, did any employees ever take a shower at 20 of five if they weren't needed to do extra work?

A. No.

* * * * * * * *

Examination

Q. (By Trial Examiner Ferguson) What would they do, just stand around and wait until ten minutes until 5:00?

A. They would go in there, they wouldn't stay out of

the locker room.

Q. They would go in and wait until ten minutes of five to take their showers?

A. No, I would catch them washing up and cleaning up when

614

I would go in.

Recross-examination

Q. (By Mr. Kimmell) Would this happen all the time?

A. Yes.

Q. Before March and after March?

A. Yes.

. . . . . .

Redirect Examination

Q. (By Mr. Glenn) If they did their cleaning up properly, did it take them up until ten minutes of five?

A. No.

Q. They could do their cleaning up and get through with the job they were supposed to do before ten minutes of five?

A. Yes, sir.

Q. But were they supposed to stay there until ten minutes of five?

A. They were supposed to stay out of the locker room.

Q. After all, the Company was paying them for that time?

A. That's right.

Q. And the Company expected them to stay at their machines until ten minutes until five, is that right?

A. Yes, sir.

. . . . . .

TRANSCRIPT OF TESTIMONY
December 21, 1951

626

FRED MARTY, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Skaggs) Your name is Fred Marty?

A. Yes, sir.

Q. How old are you Mr. Marty?

A. I was born in 1913. I have to check—38, sir. No—yes, 38.

Q. Where are you employed?

* * * * * * *

A. Louisville, Coca Cola Bottling Company.

* * * * * * *

627

Q. How long have you been employed by Coca Cola?

A. Regularly since 1931. I worked there part-time previous to that, while I was going to school, after hours.

Q. You have been there 20 years, regularly?

A. Yes, sir.

Q. What is your job there?

A. I am a salesman, sir, route salesman.

* * * * * * *

632

Trial Examiner Ferguson: Did you ever talk to any supervisors about it, or hear it mentioned by any of your supervisors?

A. A discussion as to the literature which we received was about as far as it went.

Trial Examiner Ferguson: But, it was generally known

around the plant that the union was trying to organize, wasn't it?

A. Yes, sir.

. . . . . .

Redirect Examination

. . . . . .

633

Q. Well, you did hear union talk about, around in April, didn't you? You knew the union was trying to organize?

A. I supposed it was; yes, sir.

. . . . . .

Q. I didn't ask if you were approached, I said "Did you hear the union was trying to organize in April and May.

A. Yes, sir.

Q. I suppose this is clear, but you mean you heard the union talk among the employees similarly situated as you were?

A. Yes, sir.

. . . . . .

639

FLORENCE VAN NATTA, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Skaggs) Your name is Florence Van Natta?

A. Yes, sir.

Q. How long have you been employed by Coca Cola?

A. It was eight years in September.

Testimony of Florence Van Natta

Q. What is your job there?

A. I run a packer.

. . . . . .

641

Cross-examination

Q. (By Mr. Kimmell) Did anybody ever ask you to sign a union card?

A. No; sir.

642

Q. But you knew there was a union campaign going on, didn't you?

A. Yes, sir.

Q. Around April and May of 1951?

A. Yes, sir.

Q. You were aware of it?

A. Yes, sir.

Q. Did you ever talk to anybody about this case?

A. No.

Q. Did you ever discuss with anybody about what your testimony was going to be here?

A. No, I haven't.

Q. You didn't talk to—

A. I talked to Mr. Skaggs last night. We had a meeting after work, a short period meeting.

Q. Who was at the meeting?

A. The ones out here today.

Q. Was John Biechner there?

A. No, John wasn't. The ones in the plant.

. . . . . .

Testimony of Len Galloway

644

LEN GALLOWAY, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Skaggs) Will you state your name, please?

A. Len Galloway.

Q. How old are you, Mr. Galloway?

645

A. 48.

Q. You are employed by the Coca Cola Bottling Company of Louisville?

A. Yes, sir.

Q. How long have you been so employed?

A. 12 years.

Q. In what department are you employed?

A. Advertising.

Q. What are your duties there?

A. Sign writer.

Q. Mr. Galloway, I direct your attention particularly to the period of time beginning April 15th, 1951 and extending through June 15th, 1951, and may I ask you who, during that period of time was your immediate supervisor.

A. Ike Weinhart.

Q. He is in charge of the advertising department?

A. Yes, sir.

Q. You knew, did you not, Mr. Galloway, that Local 20 of the Brewery Workers Union was attempting to organize the Coca Cola Bottling Plant?

A. Yes.

. . . . . .

646

Q. I will ask you to state if you became interested in

this campaign in the plant, that the union was waging?

A. Well, in a way I was interested in it.

Q. I will ask you to state if you worked against the union?

A. No, I didn't work against the union.

Q. Well, what did you do?

A. Well, the only thing I done was, I had some little slips made up for the different ones to sign, and the ones that I knew, and the people that I come in contact with, that weren't in favor of the union down there.

Q. Who made up these slips for you?

A. My daughter.

Q. Can you remember what they said?

A. They said, "I do not wish to be represented by any outside organization."

Q. Was that substantially what they said, or exactly, if you recall?

A. Well, I would say substantially, I don't remmeber the exact wording.

Q. Did you pass these out yourself?

A. Well, I just asked the different ones that I talked to

that I run into, if they cared to sign one of them.

Q. Did you procure some signatures?

A. Yes.

Q. Do you know about how many people signed it?

A. Oh, there was 18 or 20.

Q. And what did you do with the slips that were signed?

A. I gave them to Ike Weinhart.

Q. Do you know what he did with them?

A. I don't know what became of them then.

Q. Did any executive or supervisory employee of Coca Cola Company say anything to you about these slips,

ask you to pass them out?

A. No.

. . . . . .

648

Q. Mr. Galloway, in connection with this period of time that I have spoken about, can you tell me about when it was that you passed out these cards?

A. Along in May and in June, something or other like that.

. . . . . .

650

Cross-examination

. . . . . .

651

Q. (By Mr. Kimmell) You say you took these slips of paper and gave them to Ike Weinhart, is that right?

A. Yes.

Q. He is your supervisor, isn't he?

652

A. Yes.

Q. Why did you give them to him?

. . . . . .

A. Well, I didn't have any further use for them.

Q. (By Mr. Kimmell) Well, what was the use you were going to put them to?

A. Just to find out who was in favor of a union and who wasn't in favor of it.

. . . . . .

Q. So why did you give them to Mr. Weinhart and by that token tell management who wasn't in favor and who was in favor?

A. Well, I just figured the boss would want to know.

. . . . . .

656

Examination

Q. (By Trial Examiner Ferguson) Who did you talk with about this before you had these slips written up?

A. Well, I don't know, two or three different ones around there.

Q. Well, who were they?

. . . . . .

A. One of the fellows down in the paint shop, and I talked with one of the fellows in my department. We talked about getting up these cards and having them signed.

Q. You didn't mention it to Weinhart, you kept it from him?

A. Ike didn't know anything about it.

. . . . . .

Q. He was surprised when you turned in these cards, was he?

A. Well, I told him I had those cards signed and that was the ones that had signed up that they didn't want to be organized by any outside organization.

Q. Now, you constituted yourself as a sort of a one-man committee?

A. Yes, just to find out.

Q. And you went out, as I understand it, and the only ones that you asked to sign a card were people you had already heard express themselves, and you alway—I mean, you knew

657

how they stood, is that right?

A. Yes.

Q. When you found out how a man stood and if he was against the union, you asked him to sign a card, is that right?

A. Yes, that was the general run of things.

. . . . . .

Recross-examination

Q. (By Mr. Kimmell) Mr. Galloway, why did you think Mr. Weinhart wanted to know how many were against an outside organization?

. . . . . .

658

A. Well, I don't know, I just thought that possibly he might want to know who was in favor of it and who wasn't.

. . . . . .

660

CARL FERST, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Glenn) State your name, please.

A. Carl Ferst.

Q. Mr. Ferst, where are you employed?

A. Coca Cola Bottling Company.

Q. And what is the nature of your position?

A. Superintendent.

Q. Are you the superintendent of any particular department?

A. Production department.

Q. How long have you been employed by Coca Cola Company?

A. 38 years.

Q. What does the production department consist of, Mr. Ferst?

A. Well, it consists of the whole operation, bottling department.

661

Q. The plant department?

A. The plant department, the bottling end.

Q. Now, is some of your activity on the first floor?

. . . . . .

A. Yes, sir.

Q. Some of in the basement?

A. Yes, sir.

Q. And any of your activities upstairs on the second floor?

A. Yes, sir, all over the plant.

Q. You have no supervision over the sales department?

A. No, sir.

Q. Are you acquainted with Mr. Delmar Hoagland?

A. Yes.

Q. Do you recall the circumstances sometime in about August in 1950, when Mr. Hoagland applied for employment?

A. Yes, sir, he applied to me for a job, but I never had any in the plant at the time, and he had worked, I had given him work two or three times, even in the old plant, we had worked him over there, and I think I put him on three times, and this was either the third or fourth time that he had come back and wanted a job in the plant. At that time I didn't have any, and he had worked for Bill in the meantime, and so Bill, I asked Bill in a nice way—

Q. When you say "Bill", you mean Mr. William Miller?

662

A. Yes, sir, Mr. Miller.

Q. The sales manager?

A. I asked Bill, he had given me such a hard-luck story, that he needed work, and I told him that we didn't have anything.

Q. Who gave you the hard-luck story?

A. Delmar Hoagland gave me the hard-luck story about needing work.

Q. What did he tell you why he needed work?

A. Well, he said he was out of work and didn't have any money, and just had a hard-luck story, and I went to Bill, I said, "Wait a minute and I will ask Mr. Miller and see if he will give you a chance;" but Mr. Miller didn't want to put him on at all, and I really tried, got after Bill, and said, "Give the boy one more chance."

Q. Did Mr. Miller say why he didn't want to put him on?

A. Yes, sir, because he said he had a bad experience the last time he was there, yes, sir. And he told me that I always get him in trouble. Well, maybe I do, by trying to help somebody out. There is a time I lent Mr. Hoagland money to carry him through a little.

Q. You mean you had tried to help out Mr. Hoagland before?

A. Yes, sir, I did that two or three times.

Q. And Mr. Miller expressed the opinion that he didn't look with favor on re-employing him again?

663

A. No, sir. I persuaded him to put him on.

664

Q. Do you recall ever having seen Mr. Hoagland pass out any union literature around the plant?

A. No, sir, but I have seen him around in groups; I don't know what he was doing.

665

Q. (By Mr. Gleun) Do you get down in the basement frequently?

A. Yes, I get down there more times than I am anywhere else in the building, I think.

Q. There is a basement foreman down there?

A. Yes, Mr. Sargeant.

Q. He works under you?

A. Yes, sir.

Q. And is supposed to assist you in your duties?

A. Yes, sir.

Q. You get down there daily?

A. Yes, sir, ten or twelve times a day.

Q. You think you spend more time, perhaps, in the basement than you do in any other section of your department?

A. Yes, sir.

Q. Do you know Thomas Brooks?

A. Yes, sir.

666

Q. Was he employed by the Company?

A. Yes, sir.

Q. Do you know about the date his employment terminated?

. . . . . .

A. Sometime, I think, sometime in May, 1951.

Q. To refresh your recollection, I will ask you if it was around May 12th.

A. Yes, sir.

Q. Do you recall the occasion of the termination of his employment on that day?

A. Yes, sir, very well.

Q. Who terminated his employment?

A. Well, I did.

Q. Just tell in your own words what happened on that day, preceding, what happened on the day of his termination, and immediately preceding the termination of his employment.

A. Well, I was in the basement and I think it was about 9:30, I didn't see him on the machine—well, it was around 10:00 o'clock, I guess— and I went around looking for him. So, of course, I went to the locker room first and didn't find him there, which is right in the basement, right on the basement floor, and then I went upstairs and I found him talking to some of the boys on the first floor. So, I said to him, "Tom, what are you doing up here?" "Why don't you get on your machine?"

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Well, he never said nothing, just in a sulky way, sneery way, went back down to the basement. I can look through from the first floor down to the basement to see if he went down to his machine, and 15 minutes later he still wasn't there. So, then I went down to the basement and found him in the locker room and there I caught him smoking. I went and told him he had been cautioned about that on numerous occasions, and we certainly wasn't going to put up with that no more. Then about 11:00 o'clock at 11:30, I found him upstairs again, away from his machine, up there again, and I sent him back down. After that, I went downstairs to see if he was finishing his work there, and talked to him. I said, "Tom, are you going to work this afternoon?" and he said, "No." And I said, "I would like before you go home, I wish you would stop in my office upstairs." He came in the office and I told him, "Tom, it just looks like you are dissatisfied with everything around here, and Mr. Sargeant has been complaining on you, and telling me about you, for some time, that whenever you—

he says anything to you, you just give him a sneery look and walk away from him and don't do what he wants you to do." I said, "I think maybe the best thing is for you to quit." I said, "If you don't quit, we will have to terminate your services anyway, because we are not going to put up with this kind of thing. You are disrupting the whole thing in the basement, and we just can't put up with you."

668

Q. What did he say?

A. Well, he says, "Well, give me my money." That's all. I went and got his money.

Q. He took it?

A. Yes, sir.

Q. And left?

A. Yes, sir.

670

Q. Now, does the company have a smoking rule, no smoking rule

671

in the plant?

A. Yes, sir.

Q. Where is the prohibited area?

A. Well, the basement is prohibited, and the first floor.

Q. The entire basement?

A. Yes, sir.

Q. The entire first floor?

A. Yes, sir.

Q. How long has that rule been in effect?

A. It's been in effect there, I should think, about seven or eight years.

Q. Is there a sign up? To notify the people?

A. Yes, sir.

Q. Had you previously caught Thomas Brooks smoking on occasions? In a prohibited area?

A. Yes, sir.

Q. And what did you do?

A. I cautioned him that we wasn't going to put up with it, and that if he smoked in there, everybody else felt that they have the same privilege and we were just going to have to do something about it.

Q. Where did you catch him smoking on previous occasions?

A. In the locker room.

Q. Did you ever see him smoking at his machine?

A. No, sir.

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672

Q. Did you patrol that area down there with a view of enforcing that no smoking rule from time to time?

A. Did I do what?

Q. I mean, did you go down there from time to time and when you are there on business you—

A. Oh, yes, yes.

Q. You were there for the purpose of enforcing that rule if you saw anybody smoking?

A. Yes. We have quite a bit of machinery down there, and I am always around that basement all the time.

* * * * * * * *

673

Q. Had you ever observed at about quitting time, whenever Thomas Brooks went into the locker room?

A. Yes, sir, we had a hard time keeping him out there 30 minutes before his punching out time. I would catch him in there and warn him on that a number of times.

Q. What time was punching out time?

A. 5:00 o'clock.

Q. What time did you catch Thomas Brooks in the locker room?

A. I would catch him in there from 20 to 25, 30 minutes ahead of time.

Q. Did that happen just occasionally, or frequently?

A. It happened pretty frequently, yes, sir.

Q. Would you say it was a regular happening or an almost regular happening?

A. Almost, yes, sir.

Q. Now, did that have any effect on the other employees in the basement?

A. Yes, sir.

Q. In what way?

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674

A. They figured they could go in there too.

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Q. (By Mr. Glenn) Did other employees do this, go into the locker room about the same time Thomas Brooks went in there?

A. No, sir. Some of them would, if you didn't watch them, but Thomas was the one went in there most of the time. He figured he had more privileges than the others, I guess, I don't know.

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675

Q. Did some of the other employees start going in?

A. Yes, sir.

Q. Did it therefore create a problem for you down the basement?

A. Yes, sir.

* * * * * * * *

Q. What if anything did you do in an effort to eliminate that situation?

A. Well, in order to try to break it up, I took Tom upstairs, where we could watch him up there, do the work upstairs for a half an hour, or give him half an hours' work up there.

* * * * * * *

Q. Now, as I understand it then, you had Tom Brooks to go upstairs at about 4:30?

A. Well, it wasn't 4:30, it was about maybe 10 minutes or a quarter to five, something like that, by the time he got through downstairs.

Q. By the time he got through with his work downstairs he went upstairs?

A. Yes. They stopped feeding around a quarter after four,

see.

Q. And worked until 5:30 or so?

A. Yes, about thirty minutes.

Q. After that happened, after he started doing that, did you have any trouble about the other employees going in to the locker room early?

A. No, sir, they generally got in there about ten minutes of; it looked like they broke it up pretty good at that time. Of course, they would try to sneak in there if you didn't watch them, I mean, maybe fifteen minutes before time, but any employee will do that, I guess.

Q. When you had your conversation with Thomas Brooks, at the time his employment was terminated, what was that you told him, again?

A. What do you mean?

Q. When you had him in your office on the date his employment was terminated:

A. Oh, I thought that he was dissatisfied with his job.

Q. Did you consider his employment or services unsatisfactory?

A. Yes, towards the last, yes.

Q. Now when you say towards the last, about when did his services start becoming unsatisfactory?

A. I don't know, it looked like Tom got, I would say maybe the first of the year, around there, it started there.

Q. The first of January, 1951, you mean?

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A. Yes.

Q. Sometime around there?

A. Yes.

Q. And what had been his attitude since that time?

A. Well, just like he was always trying to create some kind of trouble or running off the machines and things like that, like I said before.

Q. Was he becoming increasingly difficult to handle?

A. Yes, sir.

Q. Was he surly and disrespectfuly towards you?

A. Yes, sir.

Q. Did he appear to be resentful of authority?

A. Yes, sir, if I had to put up with him, I would feed that thing myself, rather than to put up with him.

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680

Q. (By Mr. Glenn) Was there a Company meeting held with employees sometime in April, 1951?

A. Yes.

Q. Did you attend that meeting?

A. Yes, sir.

. . . . . .

681

Q. Getting back to this meeting, Mr. Ferst, the meeting which we were talking about, the meeting at which Mr. Schmidt made the talk, at the conclusion of Mr. Schmidt's remarks, or sometime before the meeting adjourned, did you made any remarks at the meeting?

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A. Well, I got up there and asked Mr. Austin just what the trouble was. It looked like they were mad at me and I wanted to know whether I had done something, if the Company had done something, just trying to find out what the trouble was, and that I think we should have been given the chance, if we were wrong, but he wouldn't answer me. The only reason I called on him was because he is one of the boys who is always out-spoken in all our meetings, any meeting we have, he is always one we can depend on his going to say something about it, the trucks, or anything that happens to come up.

Trial Examiner Ferguson: What is his name?

A. Austin, Ellis Austin.

Q. (By Mr. Glenn) Did you know anything about any union activities or organization at that time?

A. No, sir, but you could tell, groups around, I didn't know what was going on, but you could see groups talking, if—it looked like when I came up they scattered, so I didn't know what they were doing.

Q. You mean that was during working hours?

A. Yes, sir.

Q. And in the plant?

A. In the plant, yes, sir.

Q. And I believe you stated in substance that you just

simply wanted to make inquiry as to whether anyone was sore at you?

683

A. Yes, sir.

Q. Whether you had done anything to offend anybody?

A. Yes, sir.

Q. And if so, you wanted to know about it?

A. Yes, sir, that is right.

Q. And you say you directed that inquiry to Austin, because Austin was outspoken and had expressed his opinions at meetings from time to time?

A. Yes, sir, at all the meetings.

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Q. (By Mr. Glenn) How long had Austin been employed?

A. Oh, I think I hired him about 22 years ago, I guess.

Trial Examiner Ferguson: Is Austin a colored man?

A. No, sir, a white man. He is a driver salesman.

Trial Examiner Ferguson: Oh, he is a driver.

Q. (By Mr. Glenn) So what did Austin say if anything?

A. Well, he said I was just singling him out, and that's about all.

684

Q. Did he say that he had any gripe, or any complaint?

A. No, I don't think he did.

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Q. Now, do you recall whether you directed any remarks to Mr. Hoagland?

A. No, sir, I don't think I did.

Q. Mr. Mialbach?

A. No, I don't think I did. Now, I think I said something to George—or Paul Muting; he was sitting right

across from me. These other boys are practically new boys, except of course I know Hoagland for ten or twelve years. But, I don't remember mentioning his name.

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Q. What do you customarily call Hoagland when you say something to him?

A. Delmar.

Q. Well, what—you don't recall having made any inquiry of him?

A. No, sir; I could have, I was excited, I guess.

Q. Well, what were you excited about?

A. Just the way that things were being—Austin wouldn't answer, and I was trying to find out something, what the real trouble was.

Q. Will you state at that time whether or not you were a little—or upset, because you thought people were mad at you?

A. Yes, I was upset about the situation.

Q. Now, did you make any inquiry of—what's his name—Muting?

A. Yes. I just asked him and he said nothing, said no.

Q. What did you ask him?

A. I asked him if he had any gripes or anything, and he said no.

Q. Is that all that was said at the meeting?

A. That's all I remember, yes.

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686

Q. Do you know an employee by the name of Richard Davis?

A. Yes.

Q. Is he still employed?

A. Yes.

Q. He is in the production department?

A. Yes, sir, the basement, yes.

Q. Do you remember having any conversation with Davis in company with Mr. Schmidt, in about April of this year?

A. Yes.

Q. Will you just relate the circumstances of that conversation and what was said?

A. Well, I could see, I would see those boys a lot of times, Richard and a few of them in a group there, talking, and I told Mr. Schmidt one evening there that there is something wrong. I don't know whether these boys are mad at me or just what it is, but there is something going on; I think maybe Richard is one of the boys that we have looked after a whole lot on account of his eyes, and helped him out a little bit, got him doctors, and we thought that he would be an employee that would tell us just what it was, so I thought maybe we ought to bring him up there. So, the next mornnig we had him up.

Q. Did you know anything about any union organizational activities at that time?

A. No, sir.

Trial Examiner Ferguson: Was that before or after this meeting?

A. That was before I believe, yes.

Q. (By Mr. Glenn) Now, was Mr. Schmidt present at this meeting?

A. Yes, sir.

Q. State whether or not you inquired of Davis what grievances, if any, he or any employees might have against the Company.

A. Yes, I asked him just what was the matter, and he says, "Oh, I don't know," and I says, "I see you in groups

down there, and you split up when I come around," and he said, "Well, we just think we ought to have more money and more holidays," or something like that. That's about all that was said. I don't think he was up there over four or five minutes; and I talked to him about his eyesight, how his eyes were getting along, and he volunteered to tell us that he had nothing to do with that mess, or something like that; and that's all. I never asked him about anything.

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Q. Did you ever talk to him about the union?

A. Nothing, no.

Q. Did you ever talk to him about his employment or the termination of his employment in any manner?

A. No.

Q. Did you ever threaten, or rather tell him that he was going to be fired, or did you ever tell him that the Company knew or believes that he was a member of the union?

A. No, sir.

Q. Did you ever invite him to leave the Company?

A. No, sir, I never asked him to leave, no.

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Q. How many Negro employees do you have in the production?

A. Well, I think all together we have about 39 or 40.

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Cross-examination

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691

Mr. Kimmell: I will have marked as General Coun-

sel's Exhibit 10, a document of five pages entitled, "Affidavit of Carl Ferst."

(Thereupon the document above referred to was marked for identification as General Counsel's Exhibit 10.)

* * * * * * *

Q. (By Mr. Kimmell) Mr. Ferst, have you ever seen this document before?

A. Yes.

Q. Look at the last page and tell me if that is your signature.

A. Yes, it is my signature.

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Q. (By Mr. Kimmell) Mr. Ferst, you asked—I ask you to read on the second page, the last paragraph, where it says,

"I may have asked three or four people in a kidding way whether they had signed up with the union."

Would you read that?

A. Well, they never answered me.

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Q. (By Mr. Kimmell) The statement is, "I may have asked three or four people in a kidding way whether they had signed

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up with the union." Did you make that statement?

A. Yes.

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Q. (By Mr. Kimmell) I will complete the sentence.

"I may have asked three or four people in a kidding way if they had signed up with the union, but I never pressed anyone—"

A. I never got no answer.

Q. (Cont'd) "I never pressed anyone for an answer, or never received one that I recall."

A. Yes.

Q. Is that true?

A. Yes.

Q. You did ask people then whether they had signed up for the union?

. . . . . .

A. In a kidding way I did. Nobody answered.

Q. I am not asking whether anybody answered; I am asking

whether you asked.

A. Probably I did, yes.

Q. Who were those three or four people?

A. I don't know who they were.

. . . . . .

The question is, why did you ask them?

Mr. Glenn: Now, Mr. Trial Examiner, I move that the government counsel come over here and sit behind the table and sit down and get out of the witness' face and give the witness an opportunity to answer these questions calmly. He should be afforded an opportunity to answer the question.

. . . . . .

Q. (By Mr. Kimmell) Why did you ask these three or four people whether they had joined the union?

A. Well, I don't know, just to find out for my own self, I guess.

Q. Why did you want to know?

A. Well, I just wanted to know, I guess.

Q. Did Mr. Schmidt ever tell you what to do with

respect to the union in the plant?

A. No, sir.

Q. Mr. Schmidt never told you to keep a "hands-off" policy?

A. No, sir.

695

Q. Never said anything to you as to how you should behave? What to do with this union in the plant?

A. He told me that—no, Mr. Schmidt never discussed much of this stuff with me.

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696

Q. Now, Brooks has been working for you about nine years, hasn't he?

A. Yes.

Q. He is one of your oldest employees, isn't he?

A. No, we have employees down there, colored employees 25 and 30 years.

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Q. He wasn't a new one?

A. No, not new, he was there about nine years.

Q. After he turned bad, what did you do to try to correct it?

A. Talked to him and tried to straighten him out.

Q. What did you talk to him about?

A. About running in these showers, and disobeying the rules, smoking and all, what he was doing, that is, what we were trying to do.

Q. All right, this Saturday morning Brooks was fired, will you state whether you were engaged in production that morning? Were you bottling Coke that morning?

A. Yes, I believe we were.

Q. Are you sure Brooks wasn't in there with all the other employees to do extra work, clean up the machines and the like?

A. I don't know whether we bottled that morning or not. We probably didn't, but he has four hours to work there.

Q. But cleaning up the machines and so on?

A. Yes. I am not sure whether we bottled that morning or not.

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698

Q. You say you don't know whether, the time he was upstairs, whether he had a relief man or not, do you?

A. No.

Q. He may have had one?

A. If we wasn't bottling, he probably didn't have a relief-man; you don't need any.

Q. Where was he upstairs?

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Q. Now, you say that one of the reasons you didn't like Brooks was that he declined overtime work?

A. Well, he didn't decline overtime work; he declined overtime work for awhile, but then later he did take it, the last month.

Q. And that source of dissatisfaction was cleared up?

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A. Well, I think so. He would stay around and do some work.

Q. Now, did anybody else smoke in the locker room outside of Brooks?

A. Well, I haven't—they—you know how people are, they dump them on me, or I would see smoke down there, but then they would be gone when I got down there, but I never caught nobody in there.

Q. Did you ever see any butts around the floor?

A. Yes.

Q. Lots of them?

A. Not lots of them, but a few of them, and I would caution the boys every time I went in there, "Somebody has been smoking again, and if we catch you, we are going to have to fire you."

Q. Brooks wasn't the only one who was smoking down there?

A. He is the only one I would catch.

Q. You never caught anybody else?

A. I might have caught them away back there, but I never caught them no more.

* * * * * * * * *

Q. (By Mr. Kimmell) Do the colored employees have any place to smoke?

A. Yes, sir, we all smoke on the platform. We have a place

where we come into the garage, we have containers there for the butts, to throw the butts, and smoke there.

Q. Where is this, on the first floor?

A. Yes, we allow them, they come out of the basement and walk right up to the loading dock.

Q. Now, when are the colored employees allowed to go up there and smoke?

A. Oh, there—on their relief period.

Q. How many relief periods do they have?

A. We give them one in the morning and one in the afternoon. Sometimes we might let them go a little more; we are good to those people.

Q. How long are these relief periods?

A. 15 minutes.

Q. 15 minutes in the morning and 15 in the afternoon?

A. Yes.

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702

Q. No, I say you gave him the job upstairs and then at some point before he was fired, you said, "Well, I don't think we are going to use you upstairs any more," and then you changed your mind? Do you remember that?

A. No, sir.

Q. It never happened?

A. I don't remember it, no.

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703

Q. You say Davis was in a group talking, at one time?

A. Well, I saw him more than that.

Q. What were they talking about, do you know?

A. I don't know.

Q. Was that unusual for employees?

A. I never saw it before to amount to anything.

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Q. And then you asked Davis to come upstairs?

A. Yes.

Q. Why did you pick him?

A. Because I told you, he is one of our boys that had been helped along a whole lot, and I thought he would give us a fair answer and tell us just what the trouble was.

Q. You thought he would tell you what the trouble was?

A. Tell whether they was sore at me, sore at the Company, or what they were mad about. It just looked like they were mad.

Q. Was Tom Brooks talking around, too?

A. You mean in that group?

Q. Yes.

A. Well, I don't know; he was in groups, too.

Q. Did you see him in groups, but they would scatter when you would come around?

A. Yes.

Q. Who seemed to be most in these groups?

A. Well, I don't know.

Q. Tom Brooks, wasn't it?

A. Well, he was in a lot of them. So was all of them, all the employees.

Q. And you say at the time you talked to Davis, the first time the union was brought up was when Davis brought it up, is that right?

A. Yes. You mean in Mr. Schmidt's office?

705

Q. Yes. You or Mr. Schmidt didn't say anything about the union?

A. No, sir, not to him.

Q. And Davis just said he was not mixed up with the union?

A. Yes.

Q. And that is the first you heard about the union?

A. Yes, sir.

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Q. Did anybody tell you there was going to be a union meeting?

A. Well, George said there was, George Vernon told me there might be one, yes. That was after Mr. Saier was down with the things, though, those leaflets. I had seen that too, because Mr. Saier was calling a union meeting.

Q. Did any employees ever ask you what you thought about a

706

union?

A. Yes, some of them did.

Q. What did you tell them?

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A. Well, I told them that I—if they said anything, I would tell them—"Well, that is a decision that somebody has to make. As for ourselves, I don't think we need it." We have given all the employees, we have had good working conditions, we have had good pay, and we have given everything, insurance and hospitalization and everything, that I didn't think it would help much, but the decision was to be made by the fellow if he wanted them or not.

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Q. How about Cook?

A. That's Haitch, Clyde Haitch, yes.

Q. You have talked to him about the union?

A. Yes—no, I don't know whether I have talked to him about it. I might have said little things, you can't tell what you said.

Q. Who were these people you talked to?

A. Well, maybe some of those fellows like that. Maybe some of the drivers. I might have talked to some of the drivers, if they asked me what I thought about it.

Q. If they didn't ask you what you thought about it, you wouldn't tell them?

A. I wouldn't say nothing.

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Q. But you still asked three or four whether they joined the union?

A. Well, maybe I did, I don't know, maybe in a kidding way.

Q. Well, what do you mean by a kidding way?

A. Well, a fellow could answer, he could tell you he joined and tell you he didn't at the same time he may

belong to it.

Q. What do you mean "kidding"?

A. Well, I mean, in a kidding way, I might ask the boy, "Well, how are you getting along, are you in the union?" and

708

walk away. That don't mean anything. Lots of time the boy didn't even answer at all.

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Redirect Examination

Q. (By Mr. Glenn) Just exactly what did you when you said this in your statement which was read to you, that, "I might have asked three or four in a kidding way whether they had signed up with the union, but I never pressed anyone for an answer?"?

A. And never got one.

Q. And never received one as you recall it?

A. That's right.

Q. Now, what do you mean by, "in a kidding way?"

A. Well, just kidding, just kidding, that's all.

Q. Not a serious question?

A. No, sir, I didn't mean nothing serious about it, because if I didn't get the answer, it wasn't serious.

Q. Did you expect to receive an answer?

A. No, sir.

Q. Did you ever pause long enough to get an answer?

A. No, sir, I kept on going. I don't know, I don't believe I talked to over one or two maybe.

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710

Q. (By Mr. Glenn) Mr. Ferst, how long does it take for an employee to clean up a soaker like Brooks worked on?

A. Oh, it would average about 30 or 35 minutes.

Q. Now, how much time was allowed employees on Company time for taking showers?

A. Ten minutes.

Q. What time did he shut the soaker down? What time did Brooks shut it down?

A. Well, he didn't shut it down, just the bottles, he quit putting bottles in at a quarter after four.

Q. And that was the last round that they made?

A. Yes, then they went to cleaning up.

Q. Then it would take about a half hour to clean up after that?

A. Half hour, 35 minutes, something like that.

Trial Examiner Ferguson: How long?

A. 30 or 35 minutes. You could do it, if you hurried up, in 20 minutes, I guess.

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713

Examination

Q. (By Trial Examiner Ferguson) It was Saturday he was discharged?

A. Yes, sir.

Q. Did he work a full day on Saturday?

A. No, sir, half a day.

Q. And does the plant run full blast on Saturday mornings?

A. No. Well, sometimes it does and sometimes it don't.

Q. How was it operating this particular Saturday?

A. I don't know whether we bottled, but we have the crew in there and they wash up the machines all over; they do a thorough job of washing.

Q. Is that all they do on Saturday mornings?

A. Yes, sir, that is, when we don't bottle. Sometimes

we bottle. Now, I am not sure whether we were bottling that day or not, but we would still do—

Q. I am interested in whether Brooks' machine was running, or whether it was just a cleaning up job.

A. Well, I am not sure.

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Q. I understand that, but what I am trying to get at is

714

whether this man went off and left his machine there running.

A. Oh, no, I couldn't tell you for sure whether it was running or not. * * *

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716

Q. Well, when did you hear that there was union talk in the plant?

717

A. Well, when Mr. Saier and some of these boys were down there.

Q. That is the first you heard of it?

A. Well, it is practically the first I heard it.

Q. You didn't learn that in your talk with Davis?

A. No, sir, I didn't think so.

Q. You didn't know what he was referring to when he told you he didn't have anything to do with that mess?

A. Yes.

Q. You were left completely blank, were you?

A. Well, I wasn't completely blank, but I just didn't do much thinking about it.

Q. Now, you didn't understand that to refer to a union?

A. No, sir.

Q. Or any union talk?

A. No, sir.

Q. Well, when did you then, after that, first hear there was union talk in the plant among the boys?

A. When I heard there was going to be a meeting, when Mr. Saier was there.

Q. And that was?

A. With his handbills.

Q. Was that the same day Mr. Schmidt made his speech?

A. No, sir.

Q. It was after that, was it?

718

A. It was after that.

Q. You didn't know about it when he was making his speech?

A. Oh, you mean that there was something going on in the plant?

Q. Yes, union talk in the plant.

A. I didn't know if it was union talk or not.

Q. When Mr. Schmidt made his speech, even then you didn't know there was union talk?

A. Oh, yes, I knew something.

Q. That is what I am trying to find out, you did know there was union talk going on?

A. Just in a roundabout way, I wasn't sure about it.

Q. You knew about it in a roundabout way? That is what I am trying to find out. You did know there was union talk going on in the plant.

A. Yes.

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A. Going home, yes.

Q. Did you ever tell Hoagland that the Company knew he was a member of the union, or knew it that he was acting

for it?

A. No, sir.

Q. Did you ever discuss anything with Hoagland about it?

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WILLIAM M. MILLER, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Skaggs) Your name is William M. Miller?

A. Yes, sir.

Q. Will you state your age for the record?

A. 44.

* * * * * * *

Q. How long have you been regularly employed by the Company?

A. About 25 years.

Q. Were you ever a route-salesman?

A. Yes, sir.

Q. For how long were you a route salesman?

A. Mostly when I was going to school, during the summer.

Q. How long have you been in charge of the driver-salesmen and telephone salesmen, whether by title or otherwise, the

725

sales manager of the Company?

A. 12 years.

Q. Mr. Miller, will you describe for us the various duties you perform in your capacity as sales manager?

A. Well, I supervise all the sales activities in connection with the merchandising of bottled Coca Cola, and so-called retail, wholesale and industrial outlets.

Q. Do you keep charts showing the progress on routes and showing your sales?

A. Yes, sir.

Q. Where is your office in the plant, where it is located?

A. It is just adjacent to the truck dispatchers' office, about in the middle of the plant on the west side.

Q. Is that on the first floor?

A. Yes, sir.

Q. The basement floor where the colored boys work is one floor below?

A. Yes, sir.

Q. Are you close to the garage where the trucks are loaded and unloaded?

A. Just a door.

Q. And how far are you from the first floor production and bottling department?

A. Another door.

* * * * * * *

726

Q. Now, are you able to discharge all your duties from your office, or do you move around over the plant?

A. I move around quite a bit.

Q. Well, are you in your office more or out of it more?

A. About half and half.

* * * * * * *

Q. Now, Mr. Miller, I want to ask you, to divulge if you know an employee of the Company, or former employee of Coca Cola Company, named Thomas Brooks?

A. Yes, sir, very well.

Q. He has been with the Company a number of years?

A. Yes, sir.

Q. Will you tell the Court what you observed of Thomas Brooks' conduct there, particularly with reference to last year, we will say, of his employment?

A. Well, the Brooks' family is a family I have known for a long time, all the boys; and Toni, in the last, oh, I would say in the last nine months to a year, from my observation, apparently assumed the title of assistant basement foreman on himself, without anybody giving him it, and he has spent a lot of time, and I have seen him, away from his machine, not only in the area, in the bottling plant, but also in the garage area,

727

and also back in the cooler and advertising department.

Q. Do you know what his duties are?

A. Yes, sir, soaker feeder.

Q. Would that require him to be in the basement?

A. Yes, sir.

Q. Now these times you observed him there, was that late in the afternoon or just at what times would it be?

A. Various times during the day, working day.

Q. And how often, if you can estimate for us, have you seen him in the area that you have mentioned here?

A. Well, up to the time he was terminated or fired, I probably would see him nearly every day, for months.

Q. Upstairs or back in the back?

A. That's right.

Q. Or someplace away from his soaker machine?

. . . . . .

728

Q. Mr. Miller, I want to direct your attention to Mr. Delmar Hoagland. Can you give us the exact dates that Delmar Hoagland has been employed by the Coca Cola Bottling Company?

A. Yes, sir.

Q. When was he first employed, and when did he leave? I am thinking now of, in your sales department.

A. January 31, 1941.

Q. Was that the date of his first employment?

A. Yes, sir, to July 22nd, 1942.

* * * * * * * * *

Q. Well, when was he next employed?

A. On November 23, 1942, to November 30, 1942, seven days.

* * * * * * * * *

Q. When was he next employed by Coca Cola?

A. May 17, 1944.

Q. And how long did he remain employed on that occasion?

A. To June 20, 1944.

* * * * * * * * *

729

Q. Now when did Mr. Hoagland next apply for employment for the Company?

A. About the 15th of August, 1950.

Q. Did he apply to you for employment?

A. Yes.

Q. What did you tell him?

A. I didn't want him.

* * * * * * * * *

Q. Then was—what was the next event along the way, prior to Hoagland's final re-employment?

A. Well, he worked on Mr. Ferst.

Q. What do you mean?

A. He worked on Mr. Ferst's sympathy to get me to give him a job.

Q. Did Mr. Ferst speak to you?

A. Several times.

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Q. (By Mr. Skaggs) Mr. Miller, why was it you didn't want to employ Hoagland?

A. He was absolutely undependable.

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Trial Examiner Ferguson: Overruled. Go ahead and tell why you didn't want to hire him. If he knows, if he has got some knowledge.

A. The reason I didn't want to hire Hoagland, was because I knew for a fact he had been working in saloons where they had handbooks.

* * * * * * *

A. He was a clerk.

Q. (By Mr. Skaggs) You mean a handbook clerk?

A. A handbook clerk and a bartender. You could do both jobs.

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Q. (By Mr. Skaggs) Now, after Mr. Ferst interceded in behalf of Mr. Hoagland, what did you then do?

A. Well, that went on for over two weeks, and finally Hoagland came over and pleaded with me to give him another chance, and I did, and I put him on probation like every sales department employee is, for one year.

* * * * * * *

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Q. Now, how long did he remain as a telephone salesman?

A. Well, the usual training period for a telephone salesman is anywhere from one or two months, up to four or five

years. I would say he was, oh, I would say maybe two months.

Q. And then—what are the duties of a telephone salesman, Mr. Miller?

A. To make special deliveries to churches and schools and lodges and substitute on a regular route salesman's job, when he either ill or off for some emergency.

Q. By special deliveries, do you mean deliveries to special functions from time to time?

A. And come in over the telephone.

* * * * * * * * *

Q. Now, after Mr. Hoagland went to work as a telephone salesman and stayed there for, we will say approximately two months, what work was he then assigned to?

A. As a route salesman on the English route.

Q. Now, will you state whether or not there was bidding for that assignment?

A. I don't think there was.

* * * * * * *

736

Q. Why was Mr. Hoagland given this job?

A. Just because he could drive a truck, and get it back to the plant.

Q. Hoagland was a good truck driver?

A. Well, he could drive a truck and get it back to the plant.

* * * * * * * *

Q. Well, what route did he go to from the English run?

A. He went to his East Central 1 or 2—Haymarket route.

Q. That is all within the City of Louisville?

A. Yes, sir.

Q. Up in a section of town known as the Haymarket?

A. That's right.

737

Q. I direct your attention particularly to the date of April 21 of 1951, or thereabouts, I believe that was about the time that Mr. Hoagland was told that he would have the S & S—no, strike that.

On what date was Mr. Hoagland assigned the S & S route?

A. About the—this is a guess—about the 10th of March.

Q. 1951?

A. Yes, sir.

Q. Did he bid on that route?

A. Yes, sir.

738

Q. (By Mr. Skaggs) And as a result of his bid for the route he got it over any other bids that might have been filed?

A. No, not for that reason.

Q. Well, what was the reason?

A. The same reason we put him on that country route, because he could get the truck out there and get it back.

Q. What was his work like on the Haymarket run?

A. Lousy.

Q. Well, by that, in what respect was it lousy?

A. Well, Hoagland had a habit of taking a route and getting through with it by 1:00, 1:30, sometimes 12:30, which an ordinary Coca Cola man, that is not good, because there are certain duties that a route salesman, whether he is in Louisville, New York, Peoria or Shreveport, must do,

and he can't cover an ordinary Coca Cola route in five or six hours and do those things he is supposed to do; it is impossible.

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Q. What was the condition of your manpower situation at that time? Was it in free supply or in tight supply?

A. Tight.

* * * * * * *

Q. Did you have complaints on him missing stops?

A. Yes, sir. His sales for the month that Hoagland had the—for the month of March, Hoagland's sales on the S & S

740

route were off 20 percent.

* * * * * * *

Q. When you say that your general plant sales were up 5.4 percent, what period are you comparing that with?

A. The month of March, 1951, compared with the month of March, 1950.

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Q. (By Mr. Skaggs) Mr. Miller, will you read the monthly sales for the S & S route for the month of March, 1950, and the month of March, 1951?

A. For the month of March, 1950, 4643; for the month of March, 1951, 3708.

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Mr. Skaggs: I suppose I should have this marked for identification at this point, Respondent's Exhibit 3.

(Thereupon the document above referred to was marked for identification as Respondent's Exhibit 3.)

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Trial Examiner Ferguson: Well, I don't think it is going to help anybody very much unless you start it into this thing and showed every route, if you want to make comparisons. This overall figure, I just don't get that, to compare this one route out of 57 routes, this one route for the month of March, with the overall. Now, there are 57 routes?

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* * Some of them may have made a big increase in 1951, and some of them may have had a big decrease. I just don't know how you are going to compare it unless you have all of that before me.

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Trial Examiner Ferguson: Well, were there any other routes, out of your 57 routes, that had a decrease in March, 1951 under March 1950?

A. As far as my memory goes, Judge, none of our suburban routes show a decrease in route sales for the month of March or April 1951, compared to the same months of 1950.

Trial Examiner Ferguson: But that is your memory?

A. Yes, sir.

Trial Examiner Ferguson: You didn't sit down and figure that out from the records like you have this one?

A. No, sir.

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Q. (By Mr. Skaggs) For the month of April 1951, how

much were the sales up, percentagewise, over the month of April,

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1950?

A. 8.8 percent.

Q. How much were Mr. Hoagland's sales down from this record?

A. Three percent.

* * * * * * *

A. Well, when I give him the route, I told him if he didn't improve, that was going to be the end of the line, because Bobby Oliges was coming back out of the Navy, and he didn't show any improvement.

Q. You explained to him thoroughly that this was his last chance, did you?

A. Yes, sir.

* * * * * * *

Q. Directing your attention to April 21, 1951, or about that date, when there was a conversation occurred in the office of Mr. McHugh, was Mr. McHugh present?

A. Yes.

Q. The conversation being between you and Hoagland: Will you state what went on at that conversation?

A. I told Hoagland then that Bobby Oliges was due back on

750

April 30th.

Q. April 30th falls on a Monday?

A. I think it did; and that probably were going to do something about his job when Bobby got back.

Q. What did you tell him you were going to do about it?

A. Well, tetminate it. I terminated it.

Q. I say, what did you tell him in this conversation of the 21st, what you were going to do about it?

A. I told him we probably were going to terminate him on the 28th.

* * * * * * * *

Q. Did you tell him he would be given his old route on the Haymarket back, but that his compensation would be held up to the compensation on the S & S route?

A. No, sir, definitely not.

Q. Mr. Miller, it has been testified here that the routes are classified "A", "B", "C", and "D", is that correct?

A. Yes, sir.

Q. "A" being the highest paid and most sales, is that right?

A. Yes, sir.

Q. And "B", "C" and "D" routes being progressively less in sales and progressively less in base compensation?

A. Yes, sir.

Q. Have you ever had a lower classification route that has paid the same base pay as a higher classification route?

A. No, sir.

Q. That is over the period of time that you have been sales manager of the Company?

A. Yes, sir.

Q. You had no such conversation with Mr. Hoagland?

A. No, sir.

Q. Now, you testified that Mr. Hoagland was always coming in early off his run, but he was required to stay at the plant until leaving time, was he not?

A. Yes, sir.

Q. What was that leaving time?

A. 4:00 p.m.

Q. Now, what did Hoagland do when he got into the

plant, when he would get in early?

A. He would circulate around the employees.

Q. What employees?

A. Well, mostly colored.

Q. Well, I have reference to his whole time of employment, beginning in September of 1950 until he finally was left. Is the condition that you have described, did it prevail all during that period of time?

A. Yes, sir, he had a bad habit of getting in early off any route that I put him on, and what he was doing, I don't know;

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I think he was selling numbers or doing something, or taking bets.

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Q. (By Mr. Skaggs) Were you able to catch him doing anything on the premises?

A. No, sir.

Q. Did you try to?

A. Yes, sir.

* * * * * * * *

Q. As Mr. Hoagland served his route, particularly the S&S route, did he obey route instructions as to the roads he might run over, or did he obey route instructions?

A. He didn't obey route instructions, period.

Mr. Kimmell: Mr. Examiner, I move to strike the last answer as hearsay.

Trial Examiner Ferguson: Overruled.

Q. (By Mr. Skaggs) Do you know whether or not he ever checked customer stocks of Coca Cola and coolers?

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A. He did not.

Q. Did he maintain supplies of cartons for display purposes?

A. We got a number of calls off his route, where the customers hadn't been made, and we had to make special deliveries out to that particular stop.

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Q. Now, coming to April 28th, what did you do that morning with reference to Mr. Hoagland?

A. Well, it wasn't in the morning, Mr. Skaggs, it was in the afternoon.

Q. Well, whenever it was, on the 28th of April.

A. I called him in and told him we were totally dissatisfied with his performance of his duties, and that I was terminating his employment?

Q. Did you explain to him about the probationary period?

A. He knew that before he was hired. He was told that, rather, when I hired him. I never hired a man in my life that I did not give him a one year probation.

Q. Did you explain that to him that morning?

A. Yes, sir.

Q. What did he say to you? Did he say or ask you to keep him on or anything?

A. Yes, he wanted me to continue his employment; I didn't do it. I did do this, however: I took it on myself to give him a week's pay, which he turned down, or rather, I offered him a week's pay, because the following week coming up was Derby week, and I know he would have some little difficulty getting a permanent job. Of course, he could have probably got a job at the race track or something. So, I offered him, I think I offered him $70.00. He turned it down, and I took it upon myself, because I just wanted to help the guy out, because he was, as far as I knew, he was still in bad shape financially.

Q. Did he later return and get the money?

A. He called me up and told me that his wife had prevailed on him to accept the money, that she needed the money to pay some bills.

Trial Examiner Ferguson: You were just giving him that as a benevolence?

A. Just softness on my part, that was all, because I don't

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have anything personally against Hoagland at all.

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Q. (By Mr. Skaggs) Now, Mr. Miller, coming back to the date of April 21st, 1951, which was the date which you had the conversation with Mr. Hoagland in Mr. McHugh's office, upon that occasion you discussed with Mr. Hoagland, did you not,

757

his going back on the old Haymarket route?

A. Yes, sir.

Q. And did he request that he be permitted to go back to the old Haymarket route?

A. Yes, sir.

Q. Did you say to him that if his work improved, you might consider it?

A. That is what I told him.

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Trial Examiner Ferguson: It didn't improve during that week.

A. No, sir, there was no change.

* * * * * * *

Testimony of William M. Miller

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Q. (By Mr. Skaggs) Mr. Miller, I want to direct your attention to Frank Kamenish, and ask you if you can tell me about what date he was employed?

A. I can give you the exact date. (Witness referring to paper.) April, 1950.

* * * * * * *

Q. And on what date did Mr. Kamenish terminate his employment?

A. Derby Day, on May 5th, 1951.

Q. Who was his route manager?

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A. Carl Bunning, sir.

Q. * * * What was Mr. Kamenish's first job when he came there?

A. Telephone salesman.

Q. And then after a reasonable period of time he was given a route?

A. That is right.

Q. What route was he given?

A. West Central 3.

Q. Now, did he take that route all the time he was there?

A. Yes.

Q. And that was the one and only route he had from April, 1950 until May 5, 1951?

A. He wasn't moved up at all.

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A. He didn't develop, he was on the same route for about a

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year.

Q. What was his habit with reference to his garb?

A. Frank started a fad around there, of wearing an athletic sort of equipment as part of the Coca Cola uniform.

Q. What do you mean?

A. Baseball caps.

Q. Anything else?

A. Sweatshirts, so-called mongrammed sweaters, you might call them.

Q. Did he ever wear plaid shirts?

A. Yes.

Q. Did you ever talk to him about it?

A. Oh, many times.

Q. * * * Tell me about these Coca Cola uniforms. Do you carry a supply of those uniforms on hand?

A. Yes.

Q. Summer and Winter?

A. Summer only.

Q. Do you have jackets on hand as a rule?

A. No, sir.

* * * * * * *

763

Q. Did he finally get so he would wear a jacket?

A. You mean a Coca Cola jacket?

Q. Yes.

A. Yes, we forced him practically to wear a Coca Cola jacket.

Q. Well, did he finally get so he would wear the Coca Cola uniform regularly?

A. No.

Q. You mean one day he would have it on and the next day he wouldn't?

A. That's right.

Q. Did that continue right on up to the date he quit?

A. Just about, yes.

* * * * * * * * *

Q. Do you know anything about the incident that occurred at Coogle's dispensary at 10th and Broadway?

A. I got the telephone call.

Q. Telephone call from Mr. Coogle?

A. Yes.

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Q. What did he say to you?

A. He told me that he had never had the opportunity to complain about Coca Cola route salesmen, but he says, "Your Coca Cola route salesman is parked out in front of my store right now, and in my store getting warm, and has refused to bring in Coca Cola to me." I said, "I can't believe that." He said, "The guy won't bring it in."

Q. Well, was that Kamenish?

A. Yes, sir.

Q. What did you do?

A. I got hold of John McHugh and told him to contact Bunning and get Bunning over there.

Q. What were Kamenish's habits relative to coming to work on time?

A. He was habitually tardy.

Q. Did you remonstrate with him about that?

A. Yes, sir, I had Bunning do the same thing.

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A. I saw Kamenish frequently, on—improperly parked. But Schmidt and I both have seen him.

Q. (By Mr. Skaggs) What do you mean improperly parked? Describe an occasion, where it was, and so on.

A. Well, he usually would park on the wrong side of the street, closest to the outlet, whether it was on the right

side or left side, he would get closest to the outlet. In other words, if he was going west on Magazine, and the stop was on the north side of Magazine, he would park on that side of the street.

Q. He wouldn't do that on Broadway, which is a heavily travelled street?

A. He couldn't get away with it.

. . . . . .

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Q. Mr. Miller, did you see Kamenish out at the race track one day?

A. Yes, sir, several days.

Q. How many?

A. Twice.

Q. Well, when was it, what year and what month?

A. It was immediately after I hired him, so it must have been the Derby meeting of the Spring of 1950.

Q. Did you ever see him there in the Fall meeting of 1950?

A. No, sir.

. . . . . .

768

A. Particularly about his uniforms. And I warned him about the race track, and I also warned him about being improperly parked. There was another incident, too, where he failed to make delivery to an independent super-market which was on his route.

. . . . . .

Q. Why did you call Mr. Kamenish into your office on May 5th?

A. I heard that he had got in early, too early, for Derby Day.

Q. And you sent for him?

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A. Yes.

Q. Well, did you discuss these various shortcomings of his with him?

A. Yes, sir.

Q. Did you ask him about getting in early?

A. Yes, sir.

Q. Did you attempt to warn him again?

A. Yes, sir.

Q. What if anything did he do?

A. Blew up.

Q. What do you mean?

A. He said, "If you don't like my work, I will quit."

Q. And what did you say?

A. I said, "That suits me, let's get your money."

Q. Did you have any conversation with him about compensation insurance?

A. No, not at that time.

Q. Well, now, how many times was he in your office that morning?

A. I think it was just once.

Q. You mean he didn't go out of your office and then return?

A. I don't believe he did.

Q. Well, when did you have a conversation with him about the compensation insurance?

A. The following Monday.

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Q. And what did he say at that time?

A. I cautioned him about—he asked me about compensation, and I said you are not entitled to it, because he quit.

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Q. Mr. Miller, did you tell Kamenish that morning

before he said he was going to quit that you were going to fire him?

A. No, sir.

Q. Did you tell him you were going to terminate his employment?

A. No, sir.

Q. He just said, "I quit."

A. That's right.

Q. Do you recall hearing him say, "Put it down I quit"?

A. No, sir, I don't remember that. He was very high-tempered. I think right before that he had a busted nose from fighting.

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Q. Do you remember saying to him substantially the following? "That everybod: you think is on your side is not on your side"?

A. No, sir.

Q. Did you ever say anything to him along those lines?

A. I can't remember it.

Q. You can't remember having said it to him?

A. No, I can't.

Q. Now, I also want to ask you if, in the same conversation you said to him: "I know what you are doing. Kamenish came in right after you in the meeting."

A. No, sir, I don't.

Q. You did not make that statement?

A. No, sir.

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Q. Have you ever had any conversation with Mialback at all, concerning the union, union cards, union meetings?

A. No, sir.

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Q. Why did you discharge Mr. Hoagland?

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A. His probationary period was for one year, and we terminated him whatever day it was, because of inefficiency.

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Q. Mr. Miller, will you state whether or not Mr. Martin

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Schmidt had told you, as the sales manager of the Company, what your policy should be with reference to the employees after he learned of the union organizational effort?

A. He didn't have to tell me.

Q. Well, did he?

A. He outlined it in the sales meeting on the 25th, or something like that, of April; or restated the same policy we have had for 25 years.

Q. Well, did he tell you you were to have a handsoff" policy?

A. Yes.

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Cross-examination

Q. (By Mr. Kimmell). Now, I believe you said that one of

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the troubles of Mr. Kamenish was the fact that he didn't show any development on his route, is that right?

A. Yes, sir.

Q. And you also said that he just stayed on one route all the time?

A. Yes.

Q. Well, do you construe driver moving from route to route all the time, as an improvement?

A. When he shows improvement and there is a route available, that is a pretty good sign.

Q. Now, Delmar Hoaglad, he was put on as a telephone salesman, was he not?

A. Yes, sir.

Q. And then after a couple of months he was given the English route?

A. Yes.

Q. Was that an improvement?

A. In salary it was.

Q. After two or three months on the English route he was given the Haymarket route? Was that an improvement?

A. No, sir.

Q. Was it an improvement in the sense that it was an easier route, in the sense of less driving? Haymarket is in the city, isn't it?

A. Yes, sir.

* * * * * * *

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Q. (By Mr. Kimmell) All right, now, Hoagland was moved from the English route to the Haymarket route and then in a couple of months he was moved to the S & S route. Was that an improvement?

A. What do you mean by an improvement?

Q. I mean, was that a better route?

A. It was a country route.

Q. It was a Class C route, wasn't it?

A. That is right.

Q. And the Haymarket was a Class D route?

A. That is right.

Q. It was an improvement, wasn't it?

A. The route itself carried a "C" classification, Mr. Kimmell.

Q. More money?

A. That's right.

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Q. (By Mr. Kimmell) Did you hold it against Delmar, is that

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one of the reasons why he was found unsatisfactory, the fact as you said he was always seeking a different route?

A. I couldn't figure why he wanted a different route all the time.

Q. Weren't each of these changes a better route?

A. That one change wasn't a better route, in my opinion.

Q. Well, you can see where Mr. Hoagland might think it was better, because it was in the city.

A. He is entitled to his opinion; so am I.

Q. Certainly. Now, on April 21, you told Hoagland he could go back to the Haymarket route when Bobby Oliges came out of the Navy?

A. If his conduct and everything else improved, he may go back.

Q. In other words, you were going to give him one more week to show his merit?

A. That's right.

* * * * * * *

Q. Now, you say Kamenish at these sales meetings, use to sit back and gabble away with somebody?

A. Yes, sir.

Q. Who was this somebody?

A. Oh, I wouldn't know, because those fellows sit in no

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uniform position, every Thursday or Wednesday, whenever we had the meeting.

Q. Did he always or usually fool around with the same person?

A. I wouldn't know that, either.

Q. But you know that Frank did fool around?

A. The reports I got, yes.

Q. Did you ever get reports about his compatriots?

A. His what; compatriots? Nothing, no.

. . . . . .

Q. Now, the things that were wrong with Kamenish, as I understand is, one, that he was in improper uniform?

A. Very often.

. . . . . .

Q. Now another thing wrong was he went to the race track. Now, when did he go to the race track on those two occasions

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that you saw him there?

A. I just said that in the Derby meeting of 1950.

Q. Back in 1950? And when was he improperly parked?

A. You mean you want the days?

Q. I mean about when? I mean, what month? During the snow?

A. Oh, no, Frank didn't care what the weather was.

Q. You mean he did it in the Fall, he did it in the Winter?

A. He did it anytime, anytime he felt like it.

Trial Examiner Ferguson: Did he ever get a ticket or

anything like that?

A. Yes, he got tickets. We didn't say them, though.

Trial Examiner Ferguson: How many tickets did he get?

A. Well, I know of at least one.

. . . . . .

Q. When did he fail to make a stop?

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A. It was prior to the time that he quit. Now, what the date was, I don't know.

Q. Well, when was he told about it—did he then start to make the stop?

A. Oh, sure.

Q. Isn't it a fact that that stop is right between his and James Lueke's route?

A. No, now look, it was a borderline stop. He was making one side of the street and there wasn't any question as to who was supposed to make it, whether Lueke was supposed to make it. It was Kamenish's stop.

Q. Now, we have these four things, all these things took place during the first year of his employment?

A. Yes.

Q. You say they did?

A. Yes, I guess I did.

Q. Why didn't you fire him?

A. Why didn't I fire him?

Q. Yes, he was on probationary period; why didn't you fire him.

A. The method we use at Coca Cola is a little bit, oh, I don't know what you want to call it; I think the union election proved that we are a little bit soft-hearted on a lot of things.

Q. I don't know if it proved anything. Go ahead.

A. Well, I mean, well, we will let a boy do a lot of things.

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until we get tired of it, and then we finally have to get on him pretty seriously and then he will be called in; and in Kamenish's case, I had no intention of firing him. He blew up; he quit.

Q. Well, isn't the purpose of the probationary period to see whether a man is going to work out, and then during this year you let him go without responsibility, and he can quit without responsibility?

A. Well, I don't check a yearly probationary period right on the day. Now, he started to work, as I remember it, on April 18th, and he quit on May 5th.

Q. At any rate his probationary period was one or two months up?

A. I guess.

Q. Well, the figures show that. Now, did Kamenish ever blow up and quit any other time when you criticized him.

A. No.

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Q. Did you have any intention of firing Kamenish on May 5th?

A. No, sir.

* * * * * * * *

Q. Did any other drivers come in early on Derby Day?

A. Some.

Q. Was Mr. Kamenish the first one in?

A. Just about.

Q. Well, who was in before him?

A. Well, I don't know.

Q. Did you call that driver in and talk to him?

A. Well, he—we have some drivers in areas where the Derby traffic travelled, who get through as early as 9:00 o'clock.

Q. Wasn't Kamenish's route in downtown Louisville?

A. No, sir.

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Q. Well, it was in the City of Louisville, wasn't it?

A. The City of Louisville.

Q. And it covered part of Broadway, didn't it?

A. The north side of Broadway.

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Q. Kamenish was given a route in three months, was he not?

A. He may have been.

Q. Well, you said he was. Was that because he was a good worker?

A. Probably because he was available.

Q. How many telephone salesmen do you have?

A. Normally, anywhere from four to 12.

Q. How about the time Kamenish was given a route, how many did you have?

* * * * * * * *

A. Oh, at that time, we probably had 12.

Q. Twelve telephone salesmen, but you chose Kamenish for the route?

* * * * * * * *

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A. Eight of those 12 telephone drivers are U of L law students, or something else, and they go back to school in the Fall.

Q. (By Mr. Kimmell) But there were four full time employees?

A. Yes.

Q. Did you ever see any of your other drivers parking improperly?

A. Not as much as I saw Kamenish.

Q. But you saw others?

A. Yes.

Q. Did any of those fellows get tickets?

A. Yes.

Q. These times that Kamenish went to the race track, was he off from work unauthorized, or was he permitted to be off work? I mean, had he asked permission to be off?

A. No.

Q. You mean he was off without permission?

A. One time he was off without permission, one time he was off, and like I told you, he called up and said he was going to be sick, and I saw him out at the track.

* * * * * * * *

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Q. And this happened during the first year of his employment?

A. It happened a week or two after I hired him, if I remember right. He was a young boy.

* * * * * * * *

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Q. You say Kamenish started the fad of wearing baseball hats?

A. He did.

Q. In other words, others were wearing them?

A. Whatever one of the boys gets away with, the rest do it if they like it.

Q. How do you know the rest of them started following Frank? Maybe he was following somebody else.

A. He was the first one to start wearing a baseball hat,

believe it or not.

* * * * * * *

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Q. Aren't the winter uniforms tailor made?

A. That is what I just said.

Q. And a man comes into the plant to make them?

A. That is right.

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Q. And then you don't keep winter uniforms in stock, do you?

A. Well, if a boy quits, we buy his uniform back and if it fits somebody, we have it in stock. If it doesn't fit him, we don't have it in stock.

* * * * * * *

Examination

Q. (By Trial Examiner Ferguson) Mr. Miller, you called Kamenish in on May 5th, 1951, didn't you?

A. Yes, sir.

Q. What did you call him in for?

A. I wanted to see why he was in off his route so early.

Q. All right, now, what did you say to him when he came in?

A. And while I had him in there, I went over a few other things that he was deficient in.

Q. What did you go over with him?

A. We reviewed his whole employment, while he was working for us.

Q. Well, what did you say to him?

A. I got on him particularly for getting in there so damn early on Derby Day morning, because there was no necessity of Kamenish to be off his route by 10:30 or 10:30 on Derby Day.

Q. All right, that is one thing you took up with him.

What else did you take up with him?

A. We talked about other things.

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Q. That is what I am asking you, what other things.

A. His lack of interest in Company sales meetings.

Q. There are two things you have mentioned.

A. All right; his lack of merchandising on his route.

Q. That is three things.

A. Well, he was still wearing, at some time or another, up to the time I called him in there, he was still wearing these baseball caps and athletic equipment.

Q. And you took that up with him again?

A. And then he blew up.

Q. Now, you didn't call him in with any intention of discharging him?

A. No, sir.

Q. And dispite all these things, these things that are so very unsatisfactory, you still didn't intend to discharge him?

A. No, I had no intention to discharge him.

Q. And he got mad and quit?

A. That's happened with others.

Q. Well, I am talking about this man now. That's the way Mr. Kamenish severed his employment?

A. That's right.

. . . . . .

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Q. (By Trial Examiner Ferguson) Now, when Hoagland went on this Haymarket route, that was put up for bid, wasn't it? No, it was the S & S that was put up for bid, wasn't it?

A. Yes, sir.

Q. That is the one that was put up for bids?

A. That's right.

Q. And he was one of the bidders?

A. Yes, sir.

Q. And he got the route?

A. That's right.

* * * * * * *

WILLIAM TRICE, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kimmell) Mr. Trice, state your name and address.

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A. William Trice, 412 South 47th Street.

Q. Have you ever worked at the Coca Cola Company?

A. Yes.

Q. When did you work for them?

A. January 6, 1948 until sometime in May, 1951.

Q. May of 1951? Did you resign?

A. Yes, sir.

Q. Now, what was your job when you first went to the Company?

A. As a laborer.

Q. And how long did you work as a laborer?

A. The whole time I was there.

Q. Well, did you ever work on a soaking machine?

A. Yes.

Q. When did you work on a soaking machine?

A. I think I started in December, 1950.

Q. Who did you work with on the soaker machine?

A. Thomas Brooks.

Q. Were you on his machine constantly from Decem-

ber, 1950, until the time you quit?

A. Yes, sir.

Q. Now, during this time you worked with Thomas Brooks, did Thomas Brooks leave his machine very often?

. . . . . .

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A. I say he only left two or three minutes at a time, when he didn't have a relief man to relieve him, to get a drink of water or go to the restroom.

Q. (By Mr. Kimmell) How often would he do that?

A. Maybe twice a day.

Q. Twice a day. How often did you leave the machine?

A. Every time he took a break, I took one.

Q. How about other employees working on the soaking machines?

A. They did the same thing.

Q. Now, do you remember May 12th, the day Thomas Brooks was fired?

A. Yes.

Q. Do you remember what you were doing that morning? It was a Saturday morning, wasn't it?

A. Yes, it was.

Q. Were you bottling Coke or were you just cleaning up?

A. I disremember now, I don't know whether we worked that morning or not, but we was cleaning up and he told me that—

Q. You were cleaning up that morning?

A. Yes.

Q. Now, do you remember that morning whether Thomas Brooks was away from his machine any?

. . . . . .

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A. He may have went to the restroom.

Q. How many times did he go to the restroom that morning?

A. I didn't miss but once.

Q. How long was he gone?

A. Oh, about four or five minutes, I guess.

Q. And what time did he go to the restroom for this four or five minutes?

A. I disremember.

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Cross-examination

Q. (By Mr. Skaggs) Mr. Trice, on the morning of May 12, 1951, was the plant bottling that morning?

A. I don't remember.

Q. Well, what duties were you and Brooks performing that morning at the soaking machine?

A. We were cleaning up, the latter part of the day, I don't

808

know if we run that morning and shut down at 10:00 o'clock, or whether we just went in to clean up the machines. I don't remember whether we bottled or not.

* * * * * * *

Q. Mr. Trice, how many people work on one soaking machine?

A. Two to a soaker.

Q. And you and Brooks were the crew on this particular soaker?

A. That is right.

Q. Well, doesn't one man have to be there all the time?

A. There is supposed to be two men the all the time.

Q. But isn't one man required to be there all the time?

A. Sure.

Q. Then, when you said you took a break everytime Brooks took one, do you mean you got off at the same time?

A. No, when he came back.

Q. Then you took a break?

A. That is right.

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DELMAR HOAGLAND, a witness recalled by and on behalf of General Counsel, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Kimmell) Mr. Hoagland, when you were on the S & S route, do you remember a stop on that route called Parkside Inn?

A. Yes, sir, I do.

Q. Where was that stop?

A. That was right next to Iroquios Parkway.

Q. Is that in Louisville?

A. Yes, sir.

Q. How many days a week did you make that stop?

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A. Three days a week during the winter months.

Q. And what days of the week were they?

A. * * * That was Monday, Wednesday, and Friday.

Q. And during the summer months, how many?

A. We made it Monday, Wednesday, Friday and Saturday, during warm weather.

Q. All right, now, you started that route in March?

A. Yes, sir.

Q. Now, was that considered a winter month?

A. Well, it wasn't exactly winter, but it wasn't warm weather, it was pretty cold most of the time.

Q. All right, the first week you were on that route, did you make that stop on Saturday?

A. I made it one or two Saturdays, we had a couple of weeks of warm weather, I don't remember whether it was the first week or not.

Q. Well, did you ever not make that stop?

A. One time I did, I think it was about three or four weeks before I was fired.

Q. You didn't make that stop?

A. I missed it because it had been cold, very cold all that week, for that time of the year. It was cold that Friday. I made it Friday and filled up all their empties, they carried about 60 or 75 cases in stock all the time. The next day I was to go to Shephardsville, and that was always a short route,

I was always finished pretty early, especially on Saturday, when I went there, I was finished about 11:00 or 12:00 o'clock. I finished early that day and it was warm, warm during the afternoon later on, but it was cold that morning, cold all Saturday morning; so there wasn't any use making that stop. I never made it during cold weather because they didn't sell that much. It was a drive-in sandwich shop, most all of the business they had was all outside. So, I went on in and checked up and went home. Later on in the day, Mr. McHugh called me about 3:30 or 4:00 o'clock in the afternoon and asked me if I didn't make it, and I said no, I didn't, so he said he sent some Coca Cola out there. I think it was 15 or 20 cases, I don't know, but they still had plenty of Coca Cola Monday morning, they had

about 40 some odd cases. They didn't sell out, they didn't even come close to selling out.

Q. And the reason you didn't make that stop was because you didn't anticipate warm weather?

A. Yes, sir, I was told to use my own judgment, if it got warm, to make them on Saturday, and if it didn't, to pass them up.

Q. Who told you to use your own judgment?

A. Mr. Sheehan.

Q. And it wasn't a definite requirement to make Saturday stops?

A. No, sir, it wasn't.

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Q. How many Saturdays during the time you had that route would you say you did not stop there?

A. I would say about at least half.

Q. That was during the early part of the time you had the route, mostly cold weather?

A. Yes.

Q. Now, do you remember an incident at the Blue Lick Road?

A. Yes, sir, that is the road we sometimes use to go to Shephardsville.

Q. All right, tell the Trial Examiner in your own words what that is all about.

A. Well, when I got that route, we were detourred around that route to Shephardsville, it was a pretty long detour, because they had a bridge out on that road. They was putting in a new one, and putting up a new bridge, you couldn't get through all the way to Shephardsville. There was one stop between the start of that road and Shephardsville that we had to make, I think it was about every two weeks, or whenever you thought they might be out of Coca Cola. The first time we made it, Sheehan met me

with his car, and we took the Coca Cola in the back of his car and made it. Well, the next time I was—

Trial Examiner Ferguson: Why did you do that?

A. Well, the road was pretty rough at that time and that bridge was out. You couldn't get a truck over it.

Trial Examiner Ferguson: Did you have a prearrangement

on it?

A. Yes, sir. The next time I was to make it I was talking to him that morning and he said he would meet me at this place, I don't know the name of it now, but it was on the Preston Street at a certain time, I don't know the time now. But, I finished my route in Shephardsville and hurried on back to that place. It had been closed ever since I had been on the route. I never had been in the place. I waited about a half an hour for him and he didn't show up. The people still lived in this place, they had living quarters in the back. Well, I seen a boy playing ball outside and I told him if Mr. Sheehan, my route supervisor, came by, to tell him I was going on down to this next place, a small store at a crossroad at the beginning of this Blue Lick Road.

Q. Was the bridge put in at that time?

A. I didn't know it at the time, but the road was all right then. I was going on down to see if the road was all right, and if he came back, in the meantime, to tell him I went down there. I went down there and seen the road was all right they had just been over it with a grader that day, and I went in this grocery store and told the people I knew he would come here if this boy would tell him, and to tell him I went on and made the stop. I went on and made the stop and didn't have a bit of trouble with it. Later on I called in the office to Mr. McHugh, and he

said—I said Sheehan didn't show up, I

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didn't meet him, but if he called in, to tell him that I made the stop, and forget about it.

Q. Why didn't you wait for Sheehan?

A. I had been waiting for him about a half an hour or more, and I thought in the meantime I would be able to make the stop and save him the trouble and have it over with.

Q. At the time you made the arrangement with Sheehan to meet you there, did you know the road was repaired?

A. No.

Q. When was the first you knew the road was repaired?

A. The day I went up and looked at it, the same day. From then on, I went to Shephardsville on the same road, because it was in good shape.

Q. At the time you made the arrangement with him, you thought you would need his car to take you over?

A. That's right.

Q. Now, did Mr. Miller or Mr. Sheehan ever talk to you about your failure to make the stop at Parkside Inn, outside of this one time?

A. Never did, no.

Q. Did Mr. Sheehan ever discuss with you the time you didn't wait for him?

A. No, he didn't.

Q. He never discussed it with you?

A. Because McHugh told him I was already making the stop.

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and he knew all about it before I saw him.

Q. Did he ever talk about it?

A. No, he didn't.

Q. Did he ever complain to you about it?

A. No.

Q. And after you took over the S & S route, did Mr. Miller ever complain to you and tell you that the sales on that route were down over the previous year?

A. No, sir, he did not. They probably were, though, because we had an awfully bad winter, and when you have a bad winter, Coca Cola business always goes down. One year might be better than the next as a whole.

Q. Now, then, what time did you come back from your English Indiana route?

* * * * * * *

A. Well, a couple of times I didn't get in until 9:00 or 10:00 o'clock, during the bad winter, during that snow. We had to stay in a couple of days and had to skip the route a couple of times because of that snow. One time I had a long detour to make.

Q. How many miles is it out to English, Indiana?

A. About 45 or 50 miles.

Q. And you left the plant at 7:00 o'clock?

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A. Well, I usually left the plant about 6:30, because I always got there early.

Q. How long would it take you to drive those 44 miles?

A. I don't know exactly; I never have timed it.

Q. Well, an hour or two?

A. Well, an hour and a half or so.

Q. How many miles was the actual route?

A. Oh, I must have driven on that one route, way over a hundred miles every time I went to English.

Q. Then you had 44 miles to come back?

A. Well, that's taking the whole thing, a round trip. None of the road was too good, they were all curves and

old roads. On one route I made every two weeks, it was all over country roads, and I drove a hundred and—close to two hundred miles a round trip on that route. It was a bad route. It was a big joke in the plant; everybody made a joke out of it.

Q. You drove and you had to deliver Cokes, stop and talk?

A. Yes, sir.

Q. What time on an average did you come back from the English route? You say you came back sometimes at 9:00 at night, but on an average?

A. Oh, an average, I would get in after, never any earlier than 3:30 or 4:00 o'clock.

Q. Now, when you got the Haymarket route, what time did you

get back then?

A. I got in about, oh, an average day, oh, about 12:00 or 1:00 o'clock, 2:00 o'clock sometimes; 11:30 sometimes.

Q. Did any other drivers get through that early?

A. Oh, yes.

Q. How many other drivers?

A. Oh, on a Saturday, especially, they would be—

Q. I mean on a weekday.

A. There would be ten or fifteen, anyway. There are a lot of small routes. The route I had, I could have gotten done earlier than that.

Q. Now, when you got this S & S route, what time did you get in as a rule, on a weekday?

A. Right around 3:30 or 4:00 o'clock, something like that.

Q. What time did you leave to get on that route?

A. I left early, six thirty. I always left early.

Q. You left at 6:30 and got back around 3:30 or 4:00

o'clock?

A. That is right.

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Cross-examination

Q. (By Mr. Skaggs) Mr. Hoagland, the day you were to meet Mr. Sheehan by appointment to deliver these Coca Colas, to the stop back on this Blue Lick Road, what time did you arrange to meet him?

A. I don't remember now what time it was.

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Q. What time did you get there?

A. I don't remember that.

* * * * * * *

Q. Well, if you were going to meet Mr. Sheehan by prearrangement, had you arranged a time?

A. We didn't have no definite time; we couldn't possibly have a definite time; because I didn't know what time I was going to get done on my route.

Q. Well, you could fix the time within a half or three-quarters of an hour, something like that, couldn't you?

A. Yes.

Q. Did you fix a time that day?

A. We did, but I don't remember what time it was.

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Q. How old was the boy that was playing ball that you left word with?

A. He was about 14 or 15 years old, I judge.

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Q. Do you know who the boy was?

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A. Well, he was the people's son that owned the place, I would imagine, he lived there, said he did.

Q. How long did you stop and wait for Mr. Sheehan?

A. Well, I was there approximately half an hour.

Q. Didn't call the plant, did you?

A. Not until after I made the stop.

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Q. Yes, I know how long ago it has been. Now, do you remember what kind of weather or what kind of a March we had in 1950?

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A. I don't know how it was in 1950, I don't remember, but I know we had a pretty cold March this last March, most of it was.

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TRANSCRIPT OF TESTIMONY

January 16, 1952

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PROCEEDINGS

Trial Examiner Ferguson: The hearing in the matter of Coca-Cola Bottling Company of Louisville, Kentucky, Inc., No. 9-CA-418, will be in order. The hearing in this matter was commenced on December 17, 1951, at Louisville, Kentucky. Testimony was taken there on the merits of the matter, and the taking of testimony was concluded on December 21, 1951.

During the hearing at Louisville, Kentucky, the respondent made application for a subpena duces tecum directed to the following parties: Maurice Tobin, Secretary of Labor, Paul Herzog, Chairman of the National Labor Relations Board, and Jack G. Evans, Regional Director of the Ninth Region, National Labor Relations Board, calling for the production of certain documents, files, and papers described in the application for subpoena.

Pursuant to the provisions of the Labor-Management Relations Act, subpoenas were forthwith issued as requested in the applications. The subpoenas were served, as shown by the endorsement on each, by the United States Marshal, and the subpoenas are now made a part of the record and numbered Trial Examiner's Exhibits 1, 2, and 3, No. 1 being a subpoena issued to Maurice Tobin, Secretary of Labor; No. 2, the subpoena issued to Paul Herzog, Chairman, National Labor Relations Board; No. 3, subpoena issued to Jack G. Evans, Director of the Ninth Region, National Labor Relations Board.

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(The subpoenas referred to were marked Trial Examiner's Exhibits 1, 2, and 3, and received in evidence.)

Proceedings

Trial Examiner Ferguson: Within the period of five days, as allowed by the National Labor Relations Act and the rules and regulations of the National Labor Relations Board, Paul M. Herzog, Chairman of the National Labor Relations Board, and Jack G. Evans, Regional Director, Ninth Region, National Labor Relations Board, filed a petition to revoke the subpoenas directed to them, respectively. That petition is marked Trial Examiner's Exhibit 4 and is made a part of the record.

(The document referred to was marked Trial Examiner's Exhibit 4, and received in evidence.)

Trial Examiner Ferguson: Within the period of five days allowed by the Labor-Management Relations Act, which I will hereafter refer to merely as "the Act," and the rules and regulations of the Board, Maurice J. Tobin, Secretary of Labor, filed a petition to revoke the subpoena duces tecum directed to him. That petition is marked Trial Examiner's Exhibit 5 and made a part of the record.

(The document referred to was marked Trial Examiner's Exhibit 5, and received in evidence.)

Trial Examiner Ferguson: At the conclusion of the taking of testimony in Louisville on December 21, 1951, this hearing was adjourned to Washington, D. C., to be resumed

there on January 7, 1952. On January 2, 1952, the Trial Examiner received an application from John K. Skaggs, Jr., one of the attorneys for the respondent herein, requesting a continuance of this matter, setting forth grounds which the Trial Examiner considered adequate as the basis for a continuance. This request was supplemented by telephone, long distance, on January 3, 1952, in which Mr.

Skaggs advised me that he had consulted with the representatives of the General Counsel, who acquiesced in the request for continuance. Thereupon, continuance was granted to this date, January 16, 1952. An order to that effect was entered and the parties notified. A copy of that order and notice is made a part of the record. I will make Mr. Skaggs' letter of application No. 7, and the order and notice of continuance No. 8.

(The letter referred to was marked Trial Examiner's Exhibit 7, and the order and notice of continuance was marked Trial Examiner's Exhibit 8, and received in evidence.)

On January 5, 1952, the respondent's response to the petition of Paul M. Herzog and Jack G. Evans to revoke subpoenas, also the response to the petition of Maurice J. Tobin, Secretary of Labor, to revoke the subpoena, were filed, and they are numbered Trial Examiner's Exhibits 9 and 10, respectively, and made a part of the record.

(The documents referred to were marked Trial Examiner's Exhibits 9 and 10, and received in evidence.)

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Trial Examiner Ferguson: * * *

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Gentlemen, in view of the holdings of the Board, the consistent and unvarying holdings of the Board in this matter, and the apparent sanction by the Courts as to this date—and, by the way, I agree with Mr. Kimmell's position that

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the Highland Park case is not applicable to the situation we have here. I don't think it is applicable at all. I don't think there is anything in the Highland Park case that tends to sustain your position, Mr. Skaggs—I say, in view of the Board's repeated rulings and reiteration of the position that these matters are not litigable in this kind of proceeding, that is, they are not issues of fact that are litigable in this kind of a proceeding, and the apparent sanction of this position by the courts, I am compelled to hold that the evidence requested by these subpoenas is not relevant to any factual issue in this case, and therefore the motion to revoke the subpoenas is granted and the subpoenas are revoked and quashed.

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Mr. Skaggs: I desire to state and offer to prove that on approximately July 10, 1951, I appeared at the office of the affidavit compliance section, room 1129 of the Federal Security Building South, 4th and C Streets, Southwest.

Trial Examiner Ferguson: The location of the National Labor Relations Board.

Mr. Skaggs: And there Mrs. Gladys Dodge, the supervisor of the affidavit compliance branch of the National Labor Relations Board, permitted me to examine the affidavits of Local 20, United Brewery & Soft Drink Workers of the International Union of the United Brewery, Flour, Cereal, Soft Drinks & Distillery Workers of America, of the Congress of Industrial Organizations. As of that date, there was no non-Communist affidavit, which is NLRB Form 1081, on file for one W. B. Taylor, Regional Director of the CIO for the Louisville region.

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Proceedings

Trial Examiner Ferguson: What do you say about that,

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Mr. Kimmell? Do you admit that or deny, or do you admit that the statement made by Mr. Skaggs is correct, or do you deny it?

Mr. Kimmell: I admit it. I will make this statement, that at the time stated by Mr. Skaggs, and at the present time said W. B. Taylor is not listed as an officer of any of these labor organizations here involved.

Trial Examiner Ferguson: At the time the complaint was issued?

Mr. Kimmell: Yes, at that time, too, and that there is therefore no record of his having filed any affidavits as required by Section 9, and so on.

Trial Examiner Ferguson: When was the complaint issued?

Mr. Kimmell: October 16, 1951.

Trial Examnier Ferguson: And your statement is that at that time he was not listed as an officer?

Mr. Kimmell: Of any of the organizations, therefore no record was kept.

* * * * * * *

Mr. Skaggs: I further desire to state that W. B. Taylor of Louisville, Kentucky, is the regional director for the CIO for the Kentucky region; that Local 20 of the Brewery Workers Union, which I refer to for short, and the International

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Brewery Workers is a union affiliated with the Congress of Industrial Organizations; that as regional director of the Congress of Industrial Organizations, W. B. Taylor is charged with administrative and executive duties and powers over Local 20 of the Brewery Workers Union, the

charging union in this action.

Mr. Kimmell: General Counsel would like to state at this point, before going into the ex parte statement by counsel for respondent, there is no evidence of any duties that W. B. Taylor may have with respect to the Local. Furthermore, I would like to state for the record that the said W. B. Taylor was in attendance at the hearing, I believe during the first two or three days, and of course was available for questioning.

* * * * * * *

Trial Examiner Ferguson: Do you, Mr. Kimmell, admit at this time that W. B. Taylor is regional director?

Mr. Kimmell: He has the title at the present time.

* * * * * * *

Mr. Skaggs: I desire to show that all times since the

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filing of the original charge in this case, W. B. Taylor has been the regional director of the CIO, and in view of Mr. Kimmell's statement, I want to say that I am able to testify to those facts of my own knowledge as a result of investigation that I have made of those facts, and I offer so to do; further, that Mr. Taylor has been very active in his advice and in the prosecution of this cause.

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Mr. Skaggs: Further, I desire to state that I am available to and would testify that at about 10:20 a. m. on Tuesday, January 15, 1952, I appeared at the office of Mrs. Robert Fraser, who is now the affidavit compliance officer of the National Labor Relations Board, and was there told by Mrs. Gladys Dodge, who is supervisor of the affidavit compliance branch of the National Labor Relations Board, who is in charge of

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that office for Mr. Fraser, that—and requested that I be permitted to examine the information required to be filed by 9 (f), (g) and (h) of the National Labor Relations Act by the three unions, Local 20 of the Brewery Workers, International Union of the Brewery Workers and the CIO, and that such permission was refused to me, although I directed Mr. Fraser's attention to the letter that I had from Mr. Murdock, according me such a privilege, and I further directed his attention to the transcript of this record at page 23, where such a privilege had been accorded by the Examiner.

Trial Examiner Ferguson: No, I want to interrupt you, because I could not accord you that privilege. Those files are not in my custody and I could not order anybody to do that.

Mr. Skaggs: Maybe I had better state, in line with the statement of the Trial Examiner, contained on page 23 of the transcript of this record. Notwithstanding my direct permission to see those things, he refused to accord me the privilege of examining those documents.

Trial Examiner Ferguson: Your statement is shown on the record. Have you anything to say on this, Mr. Kimmell?

Mr. Kimmell: I have no knowledge of the facts.

Mr. Skaggs: I further wish to have marked and filed as Respondent's Exhibit 5 a carbon copy of a letter that I addressed to the General Counsel of the National Labor

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Relations Board, requesting certain information.

(Carbon copy of the letter referred to was marked Respondent's Exhibit 5 for identification.)

* * * * * * *

Mr. Skaggs: * * *

I now desire to offer as Respondent's Exhibit 6 the reply that I received from Mr. Murdock in response to my letter of November 16, this being a letter from Mr. Murdock, Mr. William O. Murdock, Associate General Counsel, National Labor Relations Board, bearing date January 16, 1952.

(The letter referred to was marked Respondent's Exhibit 6 for identification.)

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Trial Examiner Ferguson: I will withdraw my ruling on Respondent's Exhibit 5. I rejected that exhibit. I will withdraw my ruling and admit it.

* * * * * * *

* * * Here is the statement, as I understand it, that an administrative determination has been made and is as follows, and that may be shown, I think, properly shown.

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* * * I am admitting that to show that the Board has made an administrative determination. That

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is my idea in admitting it.

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Trial Examiner Ferguson: * * * I will admit Respondent's Exhibits 5 and 6.

(Respondent's Exhibit No. 5, previously rejected, was received in evidence.)

Proceedings

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(Letter dated Jan. 16, 1952, previously marked Respondent's Exhibit 6 for identification, was received in evidence.)

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INTERMEDIATE REPORT AND RECOMMENDED ORDER

Case No. 9-CA-418

Statement of the Case

Upon charges duly filed and served by United Brewery and Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, herein called the Union, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Ninth Region (Cincinnati, Ohio), issued a complaint against Coca-Cola Bottling Company of Louisville, Inc., herein called Respondent, but more often referred to as the Company, alleging that Respondent had engaged, and was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Copies of the charges, complaint, and notice of hearing were duly served upon the appropriate parties.

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[1]The term General Counsel when used herein includes the attorney representing the General Counsel at the hearing. The National Labor Relations Board is referred to herein as the Board.

With respect to the unfair labor practices, the complaint alleged, in substance, that Resondent, (1) discriminatorily discharged, Delmar Hoagland, Frank Kamenish, and Thomas Brooks, on separate dates in April and May of 1951, and thereafter "failed and refused" to reinstate them; and (2) from "about April 26, 1951, and at all times thereafter," interrogated "its employees concerning their union membership, sympathy and activities," threatened "to discharge its employees and take economic reprisals against them," and informed them that it was "aware of their membership in, sympathy for, and activities on behalf of the Union," for the purpose of "discouraging membership in * * * and activity on behalf of the Union," prepared, "caused to be circulated," and solicited "its employees to sign" an antiunion "petition for statement," and

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directed and suggested "to its employees that they engage in surveillance of the union activities of fellow employees, and report information so secured to it." Respondent's answer denies that it committed unfair labor practices as alleged in the complaint.

Pursuant to notice a hearing was held at Louisville, Kentucky, before me, Charles L. Ferguson, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner to conduct same. All parties appeared, and were represented, at said hearing, and were accorded full opportunity to be heard, to produce, examine, and cross-examine witnesses, to introduce evidence relevant to the issues, to argue orally upon the record at the conclusion of the evidence, and to file briefs and proposed findings of fact and conclusions of law. All parties waived oral argument. The General Counsel and Respondent have filed briefs and same have been examined and considered. Re-

spondent also filed proposed findings of fact which are hereinafter ruled.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

The Company is engaged in bottling, selling, and distributing coca-cola. Its plant and place of business is located at Louisville, Kentucky. By agreement of the parties the same commerce facts which had previously been stipulated in Coca-Cola Company, Employer (Respondent here), No. 9-RC-1235, initiated by a representation petition, filed by the charging Union herein, were adopted and made a part of the record in this case, as follows:

> "The Coca Cola Bottling Company of Louisville Kentucky, is engaged in the bottling and sale of soft drinks under contract with the Coca Cola Bottling Company (Thomas, Inc.) Chattanooga, Tennessee, incorporated under the laws of Tennessee. Annual purchases by the Company are in excess of $750,000, in excess of 75% of which are made in states other that the State of Kentucky. Annual sales are in excess of $750,000, of which approximately 20% represent sales to purchasers located in the State of Indiana."

Upon the foregoing stipulated facts the Board, in its Decision and Direction of Election, in Case No. 9-RC-1235, issued November 14, 1951, found that the Company "is engaged in commerce within the meaning of the Act."

II. The organization involved

United Brewery and Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, is a labor organization which admits to membership employees of Respondent.

III. The unfair labor practices

A. The Company's plant, its operations and other background facts

As stated, Respondent Company is engaged in bottling, selling, and distributing coca-cola. Its plant at Louisville, Kentucky, serves adjacent territory in that State and the state of Indiana. The Company has carried on this business in Louisville for over a quarter of a century. Carl Ferst, the superintendent of production, said he had been employed by the Company

for 38 years. Other supervisory employees mentioned having worked there from 18 to 30 years. Apparently operations have been carried on at and from the present plant premises for something like the last 10 or 12 years. There are four departments respectively employing non-supervisory employees, approximated, as follows: Production, "about 80"; Sales, 62 to 65; Cooler, "8 or 10"; and Advertising, "about 8"; or a total, excluding supervisory and office employees, varying from about 158 to about 163 employees.

At all times material herein Martin L. Schmidt, vice president and treasurer of the Company, was in charge "generally" of the entire operation. Carl Ferst, above-mentioned, is and at all material times was, superintendent of the production department. Schmidt said the "about

80 people" in the production department "do everything connected with the manufacture of the product, and the operation of the plant itself" which includes "taking" the cases of empty bottles "from our route-salesmen when they come back with empties, cleaning the bottles, putting the product back in the bottles, putting the bottles in the cases and sending" the refilled cases "out to the trucks to go out again." The cases of "empties" when returned to the plant were routed first to the basement where the empty bottles were cleaned, being processed in what are referred to as "soaker machines." The bottling was done on the first floor. It appears that the "around 45" production employees working in the basement, at the times material, "were all colored." Their immediate foreman, George Clarence Sargeant, who had been with the Company 18 years, is "white." There were "8 colored boys" working on the first floor whose job was "to stack the cases and load the trucks," making approximately 53 colored employees in the production department. The remainder of the employees in that department, and all of the employees in the other departments were white.

William M. Miller was sales manager. At the time of the hearing he had been "regularly employed by the Company 25 years," and had been sales manager for 12 years. The sales department "operates 57 sales routes," 12 of which "are interstate, serving territory in Indiana." "Each route is manned by a route salesman," also referred to at times as a "driver salesman, who drives a truck over his route and supplies the customers" along the route. The various places of business on a route to which coca-cola is regularly sold and delivered by the route salesman are called "stops." Under Miller, the sales manager, are four route supervisors, called "route managers," and "each has several routes under his jurisdiction . . .

roughly one-fourth of the routes." The route managers, at all the times material, were Raymond Sheehan, Carl H. Bunning, Sr., Irwin F. Hartmann, and Will B. Marty. In addition to the route salesmen the sales department maintains a staff of "telephone salesmen" or "special delivery salesmen who operate" small trucks and make "special deliveries" on "orders coming in over the telephone," and to "functions" of "churches, schools, or lodges" not covered by regular route deliveries, or to "a regular stop which may have been missed" or which had run short of coca-cola. Telephone salesmen also "substitute" when a regular route salesman "is ill or off for any reason." These "telephone" or "special delivery" salesmen number "ordinarily" 5 to 8, according to Schmidt, but Miller stated that "normally" they had "anywhere from 4 to 12" telephone salesmen.

All of the supervisors mentioned, except Route Manager Marty, testified, and their names figure prominently in the testimony. The Union commenced its effort to organize in the plant in April 1951. Throughout the campaign which followed the Union's principal support and response seems to have been among the route or driver salesmen, all white, and the colored workers in the production department. Without a question of a doubt, Delmar Hoagland, a route or driver salesman, initiated the union movement in the plant, in the promotion of which he was, almost from the very beginning, joined by Frank Kamenish, another route salesman, and Thomas Brooks, a colored basement worker, who worked on a soaker machine. The employment of

Hoagland, Kamenish, and Thomas Brooks[2] was terminated,

[2]The full name Thomas Brooks is generally used herein as there were three Brooks brothers employed at this plant at the time. Thomas and Carnie, who testified as witnesses for the General Counsel, and another Lavell, was not called as a witness.

in that order, in the early stages of the union campaign. The complaint alleges that these three employees were discriminatorily discharged in violation of Section 8 (a) (3) and (1) of the Act.

B. The beginning of the union campaign

Delmar Hoagland, who at the time was a route salesman, frequently talked with Frank Pilato, a brewery driver for a Louisville brewery and a member of the charging Union, while they were "eating lunch together" at a restaurant where they frequently met at lunch time, about the possibilities of the Union organizing in the coca-cola plant, and in the first part of April 1951 Pilato "put" Hoagland "in touch with" Karl Saier, secretary and business agent of the Union. Saier first contacted Hoagland by telephone "around April 10," and shortly after that date Hoagland went to Saier's office in Louisville where and when they discussed getting a union campaign underway at the coca-cola plant, and Saier "furnished" Hoagland "with (union) authorization cards and told him to distribute them among the employees" of the plant. On this occasion Saier also assured Hoagland that "if the men at Coca Cola wanted the Union he (Saier) would do all he could to help." Immediately thereafter Hoagland gave some of these cards to Kamenish and some to Thomas Brooks. Kamenish places the time that Hoagland first approached him about getting the Union in the plant as "about the middle of April," at which time he told Hoagland he "would go along with it" (the Union). As further placing the first union activity in the plant as about "the middle" of April is the testimony of George Mialback, who was at the time a route

salesman, that about that time[3] he was leaving the plant on a Saturday afternoon, having "finished" his route, and that Hoagland and another plant employee Bill Shad, who were standing near the exit, called him aside and told him "they was going to try to organize Coca Cola and asked" him if he "would help," and he told them he would. That was the first he had heard about a union in the plant.

C. Union organizational activity and incidents in connection therewith from the "middle of April" to April 25

When Hoagland enlisted Kamenish in the union movement and gave him some of the union authorization cards he had received from Saier, he told Kamenish that "there was going to be a (union) meeting later on in the month" and suggested that "in the meantime" Kamenish "find out what" he could "from different ones," and "let him (Hoagland) know how they react." Thereupon Kamenish proceded to "talk to other drivers about organizing a union," and urged them "to come to the meeting," later to be announced, "and find out about the Union" and "gave some of them cards" (the union authorization cards which Hoagland had given him). At the time Kamenish did not know when the proposed union meeting for the company employees would be held. He later learned it was to be on April 25. From the beginning of the union campaign,

about the middle of April, initiated and led by Hoagland, to the time Hoagland was discharged on April 28, Kamenish

[3]Mialback said this occurred "sometime in April or May," the "middle of May, or something like that." It is clear beyond doubt that upon his whole testimony he meant "middle" of April. That he meant to say the "middle of the month" is evident. His later testimony shows that it was before Hoagland was "fired" and that was April 28. Mialback resigned and left the plant in May. Anyway by the middle of May the union campaign was far advanced.

"met" and conferred with Hoagland "quite often" about the progress of the campaign. Thomas Brooks "passed" the union authorization cards which he received from Hoagland "around to different fellows in my department (the basement workers, all colored) to sign." He "returned the signed cards to Mr. Hoagland."

Following his conference with Saier at Saier's office, Hoagland not only enlisted Kamenish and Brooks in the campaign to organize a union in the plant, but he himself from "about April 15 engaged in the distribution of union cards to various of" his "fellow employees," and in talking with them about organizing a union and soliciting them "to join the Union." Before, but how long before does not appear, April 25, Hoagland turned over to Saier the signed authorization cards which he had to that time received from Kamenish and Thomas Brooks together with those which he himself had obtained, and at that time it was decided by Saier and Hoagland to hold a union meeting for the employees, at the union hall, on the night of April 25, Saier said that he called the meeting "through Mr. Hoagland" and instructed Hoagland "to inform the employees that there was going to be a meeting," and the time and place. Hoagland, Kamenish, and Thomas Brooks joined in notifying their fellow employees of the date, time and place of this meeting by "word of mouth."

Schmidt, the general manager of the Company, said he first heard "rumors" of the "union organization" going on in the plant "between the 15th and 20th of April." Fred Marty, a route salesman and a brother of route manager Will B. Marty, called as a witness by Respondent, said that in April "it was generally known around the plant that the Union was trying to organize" the employees. John Biechner, a driver salesman, called as a witness by Respondent, said that in April and May he "heard about the Union being

organized in the plant." Florence Van Natta, also called by Respondent, worked in the "bottling department" on the first floor. She said she "knew a union campaign was going on around April and May."

Richard Davis, a colored basement worker, who at the time of the hearing was still employed at Respondent's plant, "had," as described by Schmidt, "very poor eye sight, terribly poor." I gathered from his appearance as a witness and incidents occurring during the giving of his testimony that while not totally blind his sight is very defective. Schmidt said that because of the sight handicap Davis "was not able to perform general" work, and "we give him duties that he can perform fairly well." Schmidt said further, "we have helped him get in contact with the people who are in that rehabilitation work," but the Company has not extended "financial assistance." Ferst said, "we have looked after Richard (Davis) a whole lot on account of his eyes, and helped him out a little bit, got him doctors." At the time the union organizational activity in the plant commenced Davis had been regularly employed there for more than 5 years. At the time of the incident, which immediately follows, Davis, while fully aware of and informed about the union activity going on in the plant, had "not joined the Union." Afterward, although when, or about when, is not stated, he "signed" a union card, and attended union meetings.

Admittedly before, but it does not appear how long before April 25, although it could have been but a few days at most, Davis "came in one morning" and found that his "time card" had been "pulled." He "went downstairs" (the basement and asked Sargeant, the basement foreman, why his time card was missing. Sargeant said "he would go up and see about it." Sargeant went upstairs to the office and upon returning told Davis that Ferst and Schmidt

"wanted to see" him "in the office," but "didn't say anything about" the missing card. Davis went to Ferst's office. Ferst's greeting was in the form of an inquiry as to "how long" he (Davis) "had been here." Davis replied, "a little over five years," whereupon Ferst said,

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"we have been mighty nice to you," and Davis answered "you have." Ferst then told Davis "to wait a minute" and "a few minutes later" took him into Schmidt's office where Schmidt was awaiting them.

The following, with excerpts from Davis' testimony arranged in what appears to have been about the continuity of the conversation, represents Davis' version of what was said by Schmidt, Ferst, and himself during this conference or interview in Schmidt's office. Schmidt opened the interview the statement, in the nature of, or in effect, an inquiry, that "they had heard that I was involved in organizing a union among the colored boys downstairs. I told him I wasn't involved in trying to organize no union. He said, 'Your name was told to us that you was the leader of the boys downstairs in organizing the Union.' I said, 'Who told you.' He says, 'We are not going to tell you.' Mr. Ferst[4] said that, 'It was told to us that you and Shorty (Harold Mose) was passing out some cards.' I told him I didn't know anything about passing out any cards. . . . Mr. Ferst asked me where did I work before I came there so I told him I worked down at the Klaver Packing Company. He (Ferst) asked me why did I leave, and I told him I didn't like my work (there).[5] Mr. Ferst asked me why did I come

[4]The first part of the direct examination is not definite or specific about which statements were made by Schmidt and which by Ferst but that is pretty well clarified later in the direct examination and on cross-examination.

[5]Davis said that at the Packing Company he "worked in blood all the time, and (for that reason) I didn't like my work, there," and that he told Ferst that on this occasion.

here and start something, and I told him,' 'I am not starting anything, the way it sounds to me everybody out here seems to want a union from the truck drivers clean through the plant.' And Mr. Schmidt said, 'We heard about the truck drivers, but we didn't know anything about the boys down in the basement.' Mr. Ferst asked me, 'Why don't you go back down there' (the Klaver plant) and I said, 'I didn't like my work,' (there) and he asked me did I like my work here. I told him yes, that if I didn't like it I would not have stayed the length of time I had. I asked them was I fired. Mr. Schmidt said 'No.'. I asked him why my card was pulled, and Mr. Ferst said that was the only way they had of getting me in the office. I said, no it wasn't, 'You have a foreman down there to call me into the office without pulling my card.' I said, 'that makes a person think he is fired or something.' He (Ferst) said, 'No, you are not fired, we just wanted to get you in here to talk to you' after he heard I was involved in the Union. I asked him, why did he pick on me . . . I didn't know anything about it (the Union). He says, 'Well, your name was mentioned.' In the meantime he was still holding my time card. He asked me, 'What do the boys downstairs want in organizing a union. I says, 'The way I heard, they want more paid holidays and better working conditions, I guess,' and then Mr. Ferst says, 'I think we have one of the best places around here for working. . . . Quite a few other soft-drink companies don't have colored working there, and we have more colored here than any other soft-drink company in the city. We have nice showers for you and give you three paid holidays. Then he marked my card up and Mr. Schmidt dismissed me from his office, and told me to go back to work."

Ferst explained why he "pulled" Davis' card in this manner, that "I take" his "card out if I want to see a boy" and "he knows" by that "I want to see him before he goes

to work" as there is "nobody around to tell him." He seems to suggest such action was not unusual. Be that as it may, and his is the only testimony about the matter, if any such practice existed Davis knew nothing about it, or what the absence of his card meant, not apparently did Sargeant, his foreman. After Sargeant made inquiry about it at the office and reported to Davis that Ferst wanted him at his office

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Davis' reaction was that he was about to be "fired or something," and it was in that state of mind he reported to Ferst at his office.

At to why he summoned Davis to his office that morning, Ferst said, that a "lot of times" during the days preceding the day of this interview he had seen colored workers gather in small groups "talking," that he "would see Richard (Davis) and a few of them in a group," but "I don't know what they were talking about . . . they would scatter when I came around," and that Thomas Brooks "was in a lot of" these groups "so was all of them," the context indicates that reference here was to the colored workers. Ferst claims he was disturbed about whether "they were sore at me, sore at the Company, or what they were mad about. It just looked like they were mad." How or why he arrived at such a conclusion is not stated. Ferst said that the "evening" of the day before he summoned Davis to his office he told Schmidt "that there is something wrong, I don't know whether these boys are mad at me, or just what it is," and it was decided that Davis "would be an employee that would tell us just what it was . . . so the next morning we had him up." Ferst said he "picked Davis . . . because he is one of our boys that had been helped along a whole lot, and I thought he would give us a fair answer, and tell us just what the trouble was." . .

Although union talk and activity had been going on among the employees since the "middle" of April and Schmidt admittedly had heard "rumors, between the 15th and 20th of April," that "union organization" was going on in the plant, and these rumors were "around" at the time he and Ferst interviewed Davis, Ferst claimed that at the time they summoned Davis to the office he did not know "anything about any union organizational activities," and had not "heard anything at all about union talk," and his testimony on the whole about this suggests that he really claims, in effect, that he never so much as suspected such a thing.

Ferst related what occurred and was said after he and Davis went into Schmidt's office as follows:

> I asked him (Davis) just what was the matter, and he says, 'I don't know,' and I says, 'I see you in groups down there and you split up when I come around,' and he said, 'Well we just think we ought to have more money and more holidays,' or something like that. That was about all that we said. I don't think he was there over four or five minutes, and I talked to him about his eye-sight, how his eyes were getting along and he volunteered to tell us that he had nothing to do with that mess, or something like that, and that's all. I never asked him about anything.

Ferst then said he did not inquire of Davis "whether or not he was a member of a union" or "whether any union was organizing the plant at that time."[6] Ferst said, that he did

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[6]It is noted here that Davis had not testified that Ferst made either of these inquiries. Literally the remarks directly relating to union activity which Davis attributed to Ferst on this occasion were: (1) a statement, in the nature of a question, addressed to Davis that, "It was told to us that you and Shorty was passing out some (union) cards"; (2) a statement that he had pulled Davis' card to get Davis in to talk to him after he (Ferst) heard that Davis was involved in the Union; and (3) "what do the boys downstairs want in organizing a union." Ferst did not directly deny making any of these remarks.

not "learn" in this talk with Davis that there was union talk going on among the employees, that he "didn't know what" Davis referred to or meant when he said, as Ferst had related, that "he had nothing

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to do with that mess," but he (Ferst) "didn't understand that to refer to a union or union talk," nor did he ask Davis "what he meant" by such statement, and that in fact he and Schmidt "never questioned him," (Davis) or "asked him anything." After this disclaimer about questioning Davis, Ferst was asked, "What did you take him up there for if you didn't question him?" He answered: "The only thing I asked him was if I had done something wrong, or what is all this." Yet at one point in the cross-examination Ferst said "the first the Union was brought up was when Davis brought it up," on this occasion "in Mr. Schmidt's office," when, although neither he nor Schmidt had said "anything about the Union," Davis denied that "he (Davis) was mixed up with the Union," and that that "is the first" he had "heard about the Union." However it will be noted, as going to the accuracy and reliability of his testimony generally, that in Ferst's testimony, on direct examination, purporting to relate what was said in the course of this interview, and his testimony in that respect is set out in full, nothing is found indicating that he, Schmidt, or Davis at any time made any reference to, or mentioned, any union, or union talk, or union organizational activity.

Schmidt said that prior to calling Davis to the office for this interview he "had heard rumors of dissatisfaction among the colored employees." Further about these rumors he admitted on cross-examination that he had heard "grape vine rumors" indicating that "this" had something to do

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[7]The purported "dissatisfaction," or "a disturbance of some kind," "among the colored employees."

with unions, that there was union talk going around," and that "these grape vine rumors were around at the time" he and Ferst "interviewed" Davis. Further, Schmidt testified, along the same line, that he "asked" Ferst "to bring Davis in to talk to him" because of "grape vine reports about a little disturbance of some kind among the colored boys, and we were interested in finding out what it was, so since we had had . . . pleasant relationship with Richard Davis, and he had gotten a little help from us, we thought he was a boy that would tell us what he knew about it, what was going on."

With this back ground I turn to what Schmidt had to say about the interview and I quote his testimony in that respect:

> We just told him (Davis) that we hoped he would be able to give us some information about any difficulties or disturbance, or any unusual situations among the colored boys. We asked him whether he knew of any complaints or gripes among the boys he worked with.[8] He seemed, for some reason, to think that had something to do with union activities, and he volunteered the information that he wasn't concerned with it . . . and either I or Mr. Ferst, I don't remember which, said we weren't interested in his union feelings.

Schmidt shed no light on what further, or more, if anything, was said by any of them, Ferst, Davis, or himself, except upon a question by counsel for Respondent whether Davis "said the boys wanted more paid holidays and better working conditions generally," he answered, "I don't remember that he mentioned paid holidays but he may have." Schmidt did not deny any of the specific remarks attributed to him by Davis.

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[8]The basement production workers, all colored.

This presents the first substantial issue of credibility thus far encountered. I have weighed the testimony of the three participants in this conversation in the light of the numerous circumstances found therein pointing to what I am constrained to conclude are the real facts of this matter. In view of the fact that the interview occurred shortly, if not

immediately, and at most could not have been more than a few days, before April 25, when it was already pretty generally known, as the facts heretofore set out and found demonstrate, that union talk and activity was going on among and employees, as it had been since the middle of April, which information had come to Schmidt between April 15 and 20, I am wholly unable to credit Ferst's protestations that he had not heard anything whatever about such union talk and activity, coupled as they are with the implication that he did not even supect such, and that he viewed the purported group talks among the colored employees, with which he said Davis and Thomas Brooks were prominently identified, as evidencing that for some unknown reason, or no reason, these employees were mad at him or the Company, and that he sought through this interview to merely find out whether he "had done something wrong," which he claimed was "the only thing" he "asked" Davis. Nor, in view of Schmidt's testimony that he previously had heard rumors of "union organization" in the plant and also the "grape vine reports" which had previously come to him, and which were "around," indicating that the group talking among the colored employees "had something to do with unions," can I accept the claim that the motivation in summoning Davis to the office was solely and merely to find out the nature of this group talking with never a thought on the part of either Schmidt or Ferst that it was in any way connected with the known union activity

then in progress. I am also unable to credit the avowals that at no time did either Schmidt or Ferst in any manner mention or refer to union organization, or union talk or activity throughout the entire conversation, and that the only time any such reference occurred was when Davis, so far as same is related by either Schmidt or Ferst, gratuitously injected into the conversation a denial that he was "in the Union" or "concerned with it," which was promptly met with the assurance by either Schmidt or Ferst that they were "not interested in his union feelings." Rather I am convinced from their own testimony that Schmidt and Ferst summoned Davis to this interview because the Company having "helped" him "along a whole lot" they thought he "would tell" them, and that through him they would find out, "what was going on" in connection with the union agitation then in progress among the colored employees of which he was one. It follows, that I am constrained to accept and credit Davis' testimony about this interview, and what was said, as being substantially accurate.

From Davis' credited testimony it appears, and I find, that Ferst advised Davis, in effect, that they had called him up to the office "to talk to him" because they had "heard" he "was involved in the Union." Schmidt by a statement carrying the effect of a question, and it was so understood by Davis, told Davis that they "had heard" he "was involved in organizing a union among the colored boys downstairs," which Davis denied, whereupon Schmidt said they had been told that he (Davis) "was the leader of the boys downstairs in organizing the Union," and Ferst joined with an accusation which carried with it a question, as Davis took it, that they had also been told that Davis and another colored worker were "passing out union cards," which Davis also denied he had been doing. Ferst asked Davis why "did" he "leave" his former place of work and come "here and start

something," and why he did not "go back" to his former place of employment,[9] and what the colored "boys downstairs want in organizing a union." Apparently the method of approach adopted by Schmidt and Ferst in their effort to draw Davis out about the union activity among the colored employees was to advise him that they had been told, and this is not to question that they had been so informed, that Davis was fostering the Union, and was a leader in that movement, among the colored employees, but Davis' disclaimers were such as to give little information about his own connection, if any at that time, with the union activity among the colored employees, or to shed light on the extent or progress of the movement itself, and he was dismissed.

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D. April 25, first company meeting, first union meeting

As has been noted the first union meeting for company employees was called for the night of April 25 (Wednesday), and notice thereof and time and place, with invitation to attend, was given by "word of mouth" to the driver-salesmen and others in the sales department, largely by Hoagland and Kamenish, and to the colored production employees largely by Thomas Brooks. I think it a reasonable inference that on or before April 25 management learned or was informed about the union meeting to be held that night. During that day, Thomas C. Aikins, a route salesman, who had previously been solicited by Hoagland "to join the Union," was asked by Miller, the sales manager, if he "was going to the Union meeting that night." Sometime during the day of April 25 management decided to hold a

[9]Davis had been a member of a union at his former place of employment.

meeting of the "driver salesmen" or "sales employees" around 4 o'clock that afternoon. It must have been a well nigh last minute decision as they apparently did not have time to give the customary or usual notice of a meeting. Some matter of greater urgency than merely sales pep talks, or discussion of sales methods or plans, undoubtedly prompted the calling of this meeting. Schmidt said that meetings "in all departments" were held "from time to time," and that "we usually give part of a day or a day or two notice." Witnesses for the General Counsel, Hoagland, Kamenish, and Mialback (all route salesmen) said, that customarily notice of a company meeting was given, by posting a notice on the bulletin board, "two or three days . . . . ahead of" or "before the meeting." Kamenish said this meeting was the only one called "without prior notice" while he worked there, and Mialback could not remember any other meeting that was held on such short notice. Schmidt said "notice" of the meeting was "not posted" and was given only "a few minutes before" or "a short time before" but he could not remember how the notice was given." The testimony on the part of the General Counsel is undisputed that the meeting was first announced at 4 o'clock that afternoon, "which was quitting time" for the driver or route salesmen, and that as the driver salesmen were "standing at the time clock ready to punch out for the day . . . one of the route supervisors came down" and announced that "there was going to be a meeting," whereupon the driver salesmen "went upstairs to the meeting room."

Schmidt stated, on direct examination, his reason for calling this last minute, seemingly emergency, meeting of the route salesmen after quitting time that day was that "we had some matters to discuss with the salesmen that had been hanging fire for some short time. We wanted to discuss those things with them, such as the beginning of the

summer season, and stocking up dealers for Derby Day (May 5)[10] which wasn't too far off, and that sort of thing, merchandising efforts for the summer." However, later in response to questions by the Trial Examiner, Schmidt said that "because he had heard that there was union activity going on in the plant" he "wanted to clarify with the employees" the Company's "position" about a union, and that that "was one of the purposes." The timing, and other surrounding circumstances, indicated that in fact the real reason was the union activity and the union meeting called for that night.

Schmidt's testimony about what he said in the speech or talk which he made on that occasion to the assembled salesmen is corroborated in the main by the other testimony about this meeting. He said that after he had discussed the matters relating to sales, about set out, which had prompted him to call the meeting at this time, he made a closing "comment" that "our long standing policy had been that they were permitted to join a union if

they wanted to, or refrain from joining; that they were permitted to go to any church they wanted to, or undertake any educational activities; that none of these things, lodge membership and such had anything to do with our employment." Continuing this "comment" Schmidt cautioned the salesmen to take "careful thought before making any important decision about employment or anything else," and that he "hoped they would consider anything they heard one way or another very carefully." While Schmidt was speaking the salesmen were confronted with a "blackboard" upon which was written, "STOP, LOOK, THINK," to which Schmidt directed their attention when making his comment

[10]The testimony of the driver salesmen was that this was usually done the day before DERBY day, or at the earliest a day or so before.

relating to a union. At the conclusion of his remarks Schmidt asked Miller, the sales manager and the head of the department there assumbled, purportedly to hear a discussion of the "merchandising" items first stated by Schmidt as the purpose of the hastily called meeting, "if he had anything to say" and Miller said "No," whereupon Ferst, superintendent of the production department,[11] who had been seated "back in the audience," "jumped up" and said, "I have." Ferst then said, "I want to know what this is all about, what's the trouble,"[12] and pointing to Austin, a route salesman, about 60 years of age, who had been with the Company about 22 years, demanded, "what about you Austin, what's the matter?" Austin replied, "Well, there's a lot of things wrong down here, but the only thing I got to squawk about right now is if you have a complaint and go to the office and tell them about it they make a fool out of you."[13] No employee, other than Austin, had said anything to this point. Ferst next pointed to Hoagland[14] and said, "What about you Delmar," and asked him if he (Hoagland) "had any complaints." Hoagland answered, "I don't know what you are talking about Carl." The next inquiry made by Ferst was to "George." As related by George Mialback, a route salesman, who about the "middle" of April promised Hoagland to help him organize a union in the plant, Ferst inquired, "What about you George." No one answered. Mialback said, "I didn't know if he was talking to

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[11]The production employees were not included in this meeting and none were present. This meeting was limited to sales department employes.

[12]Clearly this inquiry of the group and the subsequent inquiries which Ferst directed to individuals related to the occasion for the union activity or talk which had been going on since the "middle of April," and not to any merchandising problems. He had no responsibility for or authority over the sales department.

[13]About this Schmidt said, "I expect he (Austin) has made a fool out of himself by some of his suggestions, although we never tried to tell him that."

[14]Ferst said that he "had seen" Hoagland "around in groups."

me or George Vernon. I was sitting pretty close to George Vernon. I didn't open my mouth, and George Vernon didn't say anything," but "his face got red." This ended the meeting.

Hoagland said Ferst "shouted" his inquiries while Mialback described Ferst as being "in a uproar," and Ferst said, "I was excited," and "upset about the situation." However, he understood to say that this situation to which he referred, and in connection with which his inquiries were made, did not relate to union activity or union talk. On direct examination Ferst asserted that "at the time" he made these inquiries he did not "know anything about any union activities or organization." This in the face of the remarks by Schmidt concerning joining a union which had just been made, and Schmidt's admission that having "heard there was union activity going on in the plant" he "wanted to clarify" the Company's "position" about unions, and that was "one of the purposes of the meeting." Again claiming that, apparently with never a thought of union activity being involved, he had seen groups talking and that when he approached "they

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scattered,"[15] Ferst said he made these inquiries of the group and the several individual sales employees because he "wanted to find out whether anyone was sore at" him, and whether he "had done anything to offend anybody." Finally despite his adherence on direct examination to the claim that up to this time he was ignorant of, had no information about, and had not heard of, any union talk or

[15]Ferst had advanced as an explanation for questioning Davis that he had seen the colored employees in the production department of which he was the head talking in groups only to scatter on his approach; now he apparently claims that he had also seen, and was concerned about, the employees of the sales department, over whom he had no authority doing the same thing. No other supervisor mentioned seeing any group talking.

activity, he stated later, in response to questions by the Trial Examiner, that at the time of this meeting he knew, "just in a roundabout way there was union talk going on." The foregoing specifications, and those previously noted, serve to illustrate something of the equivocal nature and unreality of much of Ferst's testimony on material phases of the case, which creates a distinct dubiousness as to the credibility and value generally of his testimony.

The witnesses varied, from 20 to 30, in estimating the number of employees attending this first union meeting the night of April 25. Saier said the "functions of the Union were explained and those who had not already signed were invited to do so." All present who had not yet signed cards, did so, "except one man." The context indicates that this is the union meeting at which Joseph P. Parrish, a route salesman, who was still working in that capacity at the time of the hearing, signed a card.[16] Parrish said that he "heard a lot of talk about organizing a union and union meetings, and knew by the talk where they were and what time." At the close of the meeting Saier gave Hoagland "a number of additional union authorization cards" which he "took away with him." Kamenish also took "some cards out."

E. April 26

On the morning of April 26, following the first union meeting for employees the night before, the production employees were notified as they reported for work that there was to be a company meeting that morning before work started. The meeting was for production employees only. Again the blackboard this time bearing the word "Think" was used. Schmidt was the only person who said anything

[16] While Parrish, saying he could not remember the date, fixed the time of the first union meeting as being in May, it is clear that he referred to this first meeting the date of which was definitely fixed as April 25.

at this meeting. Ferst who had been conspicuous in the interrogation of the group and certain individuals at the meeting of the sales employees the previous afternoon, did not have anything to say at this meeting of the employees of the department of which he was the superintendent.[17] On direct examination, Schmidt, continuing the explanation that these meetings, this and the one the previous afternoon, just happened to be called when they were because it was deemed necessary that certain business conditions of an immediately pressing nature be discussed with the employees, said that, at this early morning meeting of production employees, he discussed "stocking dealers and similar things that happen outside the plant that they were interested in," and that he "talked about going into the busy season, the busier season rather," and "that it was necessary for every employee to give his best to the job." The foregoing

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was Schmidt's answer to his counsel's question, on direct examination, as to what was "discussed" at this meeting. Since Schmidt had not mentioned whether he said anything at all relating to union activity, his counsel then asked a further question about the matter and Schmidt answered, as follows:

> Q. And then you came around to talking about Company policy, the rights, and obligations that employees had, did you say substantially the same to the production employees that you said to the sales employees?
>
> A. Yes, sir, we thought that a nice, good, clear statement of Company policy at that time might be helpful.

[17] It will be recalled that it was among the route or driver salesmen, who had been called together the previous afternoon, that the union movement had its beginning and its initial strength.

A colored basement worker, Frank R. McCoy, said he remembered Schmidt saying, on this occasion, something to the effect, "you can belong to any lodge, go to any school, be of any race, and still work here, and you can even have a union and still work here." In reply to a question by the Trial Examiner as to the purpose of this early morning meeting Schmidt said: "The principal purpose of that meeting was to give them the repetition of our statement of policy on membership in various organizations, because we felt after going into it with the sales department we should cover the rest."

Frank R. McCoy, a colored basement worker, who started working in the plant in July 1948 and was still working there at the time of the hearing, called as a witness by the General Counsel, testified that "in the afternoon" of April 26,[18] Sargeant, the basement foreman and his immediate supervisor, "came to me" as "I was on my way upstairs to buy a coke, and said, 'Frank did you sign one of those cards,' and I asked him what cards, and he said 'The meeting this morning—' and I interrupted and said, 'Yes the meeting this morning[19] sounded as if they are trying to get a union in.' He said, 'Well, did you sign one of those cards.' I said, it is like this, if a majority of them want it, I want it too." Continuing McCoy said, "I didn't give him any answer as to whether I had or had not" signed a card, and that as he (McCoy) "walked away" Sargeant said, "you might lose your job over it."

Sargeant denied, that he had ever had "any conversations with" McCoy "about the Union," or that he ever

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[18]The date is fixed by his testimony that it was in the afternoon of the day the company meeting for production employees was held "at 8 o'clock" in the morning.

[19]The company meeting for production employees which had been held about 8 o'clock that morning at which Schmidt discussed a union in the plant.

asked "him whether he belonged to the Union," or "if he had gone to union meetings," or had "ever threatened to fire him," or "lay him of," or had ever asked him "whether he was a member of the Union, or activity engaged in the organization." Sargeant had been employed by the Company for 18 years, and had been basement foreman for 10 years next before the hearing. While generally impressed with the inclination of Sargeant to be a lenient boss, I gathered the impression that he was disappointed about the overwhelming way in which the union movement had taken hold among his basement workers. I closely observed these witnesses and have weighed their testimony in the light of the surrounding circumstances existing at the time the events are said to have occurred, and I am constrained to credit McCoy's testimony about what Sargeant said to him that afternoon.

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F. From April 26 to and including April 28

Hoagland testified that on April 27,[20] he "was going up the steps to the check room" and Ferst was on the steps "right in front" of him, that Ferst stopped and "waited for" him and "asked" him "what was all this he (Ferst) heard about" him (Hoagland) "going around talking to the men in the plant about a union," that in reply he told Ferst he "didn't know what he (Ferst) was talking about;" and Ferst "said that he knew very well what it was all about, and just forget about it" and "after all I have done for you." Hoagland said that he talked with Ferst "again that same day" (April 27), that as he (Hoagland) "was leaving the plant" Ferst came "out the gate in his car, and he stopped and asked me where I was going," that he

[20]The date is specifically fixed as it was the day before Hoagland was discharged.

told Ferst he was going to the buss stop and "he (Ferst) asked me to get in, that he would ride me up. When I got in the car, I said 'About this question you asked me about going around and talking to all these men, I asked them to come to a union meeting, or asked them about it,'" that Ferst said, "Let's just don't talk about it, because we know all about it." Ferst let Hoagland out at a certain street intersection where by prearrangement Hoagland met Thomas Brooks who was accompanied by his brother Carnie. Thomas Brooks "needed some more (union) cards for his department" and Hoagland had arranged to meet him at this point and supply him with cards, which he did, and discussed with him the progress of the union campaign among the colored production employees. It is not claimed that Ferst saw, or knew about, Hoagland meeting the Brooks brothers. I credit the testimony of Hoagland, Thomas Brooks, and Carnie Brooks, that such meeting occurred as Hoagland described it. Thomas Brooks said he "had made an appointment to see" Hoagland at that point. Both Thomas and Carnie Brooks saw Hoagland get out of Ferst's car at the intersection.

As to Hoagland's testimony about a conversation with Ferst on the steps sometime during the day of April 27, Ferst recalled "having seen" Hoagland "shortly before his services were terminated by the Company"[21] but stated that he did not "have any conversation with" Hoagland at that time "about the Union." He did not state what, if any, conversation did occur at that time. Ferst said he could not recall "having picked up Hoagland and giving him . . . a lift a day or two before his (Hoagland's) employment was terminated." However he said it was his practice to "pick up . . . . anybody going my way . . . . about

[21] Hoagland was discharged the next day, April 28.

quitting time" and that he never told Hoagland "that the Company knew he was a member of the Union, or knew he was acting for it." As noted I credit the testimony that Ferst did, as Hoagland said, in the afternoon of April 27 give Hoagland a ride in his automobile to the intersection mentioned where Hoagland met Thomas Brooks. In view of all the testimony bearing on the two incidents of that day described by Hoagland and the nature of Ferst's testimony as whole, I credit Hoagland's testimony to the effect that during the day of April 27, Ferst, under the circumstances described by Hoagland, accosted Hoagland and demanded, "what was all this" which he (Ferst) had "heard about" Hoagland "going around talking to" employees "about a union," and expressed disappointment that Hoagland would do that "after all" he had "done for him, and that when, during the ride in Ferst's automobile, Hoagland referred to Ferst's inquiry earlier in the day, Ferst said, "Let's just don't talk about it, because we (the management) know all about it," meaning Hoagland's activities on behalf of the Union.

"Just a few days . . . after" the "first union meeting," which had been held the night of April 25, Saier and an "assistant," Thomas Gray,

also a union representative and not an employee, distributed "leaflets outside" the plant to the employees. Among other things contained in the leaflets was an announcement of a second union meeting for employees to be held the night of April 28.[22] While Saier and Gray were so engaged Schmidt "approached" Saier and "asked for one of the leaflets." Schmidt "looked at the leaflet" and told

[22]The precise date that Saier handed out the union literature is not fixed but it could only have been on one of the three dates of April 26, 27, or 28.

Saier, "you make it look pretty bad" Saier replied, "I heard that's the way it is." Later the same day Miller "came out" and talked with Saier. In the course of the conversation Miller remarked that he "had heard good things about" that union, and "if they had to have one he thought his employees should be represented by the Brewery Workers Union."

The context indicates, and it appears that it was about this time, somewhere between the first union meeting for employees, on April 25, and the second such union meeting, on April 28, that Thomas Brooks "went into" Ferst's "office to borrow $2.00 from him." Ferst told Brooks "he had something he wanted to ask" him and that "he wanted" Brooks to tell the truth, because he "trusted" him. Brooks asked Ferst "what it was," and Ferst inquired if he (Brooks) "had heard anything about a union"? and Brooks "told him no"; whereupon Ferst said, "in case you do let me know," and added that "they wouldn't have a union," and "wasn't going to stand for it" (a union). I have credited Brooks' testimony, above set out, about this conversation, and Ferst's inquiries and remarks. Ferst did not specifically deny the remarks attributed to him, and his general denials that he never at any time asked any of "the people in the plant about the Union" and his representations that he did not know what was going on in that respect is refuted by the circumstances and by his own testimony taken as whole.

Kamenish, a route or driver salesman, had a route in the city of Louisville. His route was one of those under the supervision of Route Manager Carl H. Bunning, Sr. Kamenish testified, that "a couple of days"[23] after the

[23]He was not sure as to time and at one point said "a week" or "maybe not quite a week" after the union meeting of April 25. It appears, however, to have been prior to April 28.

first union meeting, held on April 25, Bunning "came out on my route and met me at 11th and Chestnut," and that a conversation about the union organization going on in the plant ensued; that if Bunning came out on the route, on that occasion, "for any other" purpose than to discuss the Union with him "he (Bunning) didn't" mention such "purpose," and the subject of a union in the plant was the sole matter discussed; that Bunning "asked me if I went to the (union) meeting the other night, and I told him yes, and he asked me, 'Did you sign a card,' and I told him no, because I didn't think it was any of his business whether I signed one or not, and at that time he told me he had talked to some of the other fellows, and one in particular told him he signed a card, and later I talked to this boy and he said he didn't tell him he signed a card"; and that in the course of this conversation Bunning "told me about the time before when they tried to get a union in down there, and that he wasn't for it, and thought, just like Bud (Schmidt) said,[21] the best thing to do was look at both sides. He said he thought I was more level-headed than to jump into something blind."

On cross examination the following questions and answers tend to show the effect of Bunning's remarks and attitude:

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Q. Were you in anywise threatened by Mr. Bunning?

A. Not exactly but in a round about way I guess you could say I was.

Q. What did he say that made you think he was threatening you?

[21] Apparently a reference to Schmidt's statements as the company meeting for sales employees the late afternoon of April 25.

A. The way he talked, it just sounded like there was going to be some of us let out, and like I told him, I couldn't afford to be let out, . . . and I'll have to look at both sides, and he said, 'that is the thing to do.'

Q. He told you to be careful and consider both sides?

A. That is right, that is the reason I considered it to be a scare.

Q. And prior to that in the meeting, Mr. Schmidt had said for you to consider both sides and take whichever was the best deal, is that what he said?

A. That is right but I could see no reason why Mr. Schmidt should tell us that, and then have Mr. Bunning come out and tell us.

Jim Lueke, a route salesman, at the times pertinent here, had a route in the city of Louisville adjoining Kamenish's route. This route was also under the supervision of Route Manager Bunning. Lueke was still working as route salesman under Bunning at the time of the hearing. Lueke early signed a union card and attended the first union meeting for employees, as well as the later meetings. Lueke, called by the General Counsel, testified, that on Saturday, April 28,[25] Bunning "met me on the route and asked me if I signed a union card, and I told him yes, and then he asked me did I go to the (union) meeting, and I told him yes . . . . he asked me if I thought that was the right thing to do." Lueke said he did not answer the last inquiry but diverted the conversation from the subject of Union by talking "about something else." There is no evidence on the part of either Lueke or Bunning that Bunning mentioned or took up or discussed any matter appertaining to

[25]Lueke fixed the time of this incident as "on a Saturday . . . after the first (union) meeting" (April 25) and "before Derby Day," which was Saturday, May 5, so it must have been Saturday, April 28.

Lueke's work or company business or that his purpose in contacting Lueke on this occasion was other than to bring up with him the matter of the Union in the plant. On cross-examination of Lueke this question was asked and answer given:

> Q. He (Bunning) didn't tell you that you would be better off if you got out of the Union, did he?
>
> A. Yes, he did try to tell me that—he didn't think it was right himself; he didn't think I should think that way.

Bunning said Kamenish's testimony that he (Bunning) asked him "if he had gone to a union meeting, and if he had signed a card with the Union" . . . was untrue," and that on the occasion described by Kamenish they had talked "in a casual sort of a way about different things," that the subject of the Union was introduced into the conversation by Kamenish asking him,

apparently out of a clear sky, without anything having been said to that point about a union, "how the Union was coming along,"[26] whereupon the matter of a union having been thusly injected into the conversation he, "in so many words, . . . told him (Kamenish) to think, to use his own mind, and think both sides, and to make up his own mind which side he would like to be on," and that was all he said, on that occasion, relating to unions. Concerning the conversation about which Lueke testified Bunning said he met Lueke on his route and had a conversation with him "in which unions were mentioned," but the conversation did not have "any bearing on attending a

[26]This is Bunning's explanation of how the subject of the Union got into the conversation. Why Kamenish, one of the leaders in the union movement, should ask his supervisor such a question is puzzling.

union meeting," and that he himself "brought up" the subject of unions, and "told him (Lueke) the same as I told Kamenish, to weigh both sides and make up his mind." On his direct examination Bunning was asked "what was the occasion" for his conversation with Lueke. He answered:

> Well there was some talk around the plant about the Union, . . . and a lot of the fellows had expressed a desire to get off the union side and possibly get on the company's side, and I thought maybe by talking to a fellow that I could help him out in some way, not hinder him.

Bunning said that he "brought up" the subject of the Union with Lueke "because I just thought maybe there was something on his mind; he was sort of a new fellow" and that the matter bearing on his mind might "possibly" be the Union. On cross-examination Bunning stated that he talked to a "lot of" "route salesmen," his "own men . . . about the Union," and "told them to use their own noodle and think about the thing." In this connection he explained that his "idea" in talking to his route salesmen about the Union was "to maybe give a fellow some help one way or the other if he was on the fence."

Bunning admitted that he talked to a "lot of" his "own men" about the Union, route salesmen working under his supervision, with a view to helping them, "to get off the Union's side and get on the Company's side," or to help "a fellow, . . . if he was on the fence," and his rather considerable activity of that kind, and also the circumstances and conditions existing at the time he sought out Kamenish and Lueke on their respective routes to discuss the Union with them as well as my observation of these witnesses, lead me to credit the testimony of Kamenish and

Lueke concerning these conversations as being substantially accurate, and to find that, on those occasions, Bunning interrogated each of them as to whether he had signed a union card and attended the union meeting, that his admonition to Kamenish about being "careful" to consider both sides, and other language used, was such as to arouse in Kamenish's mind the apprehension that he might be "let out" if he continued his union alignment prompting a plea by Kamenish that he "couldn't afford to be let out," and that Bunning undertook to impress upon Lueke that he (Bunning), Lueke's supervisor, did not think it was right "to join the Union" or for Lueke to favor the Union.

"Right after the union meeting,"[27] Irwin F. Hartmann, a route manager, approached two of his route salesmen, Thomas C. Aikens and Joseph P. Parrish,[28] "in the locker room," and brought up with them the

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subject of the Union. Both Aikins and Parrish were still working as route salesmen at the time of the hearing and were called as witnesses by the General Counsel. Aikins said, that, on that occasion, Hartmann "asked me if I had signed a union card," and "I told him, no,"[29] that Hartmann then asked him "whether" he "had gone to the union meeting," and "I told him I went to the union meeting." Parrish said, that, on that occasion, Hartmann "asked me did I attend the union meeting, and I said I did," and then "asked me did I sign a card, and I said I did." Both

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[27]The context indicates, as I construe it, that the reference is to the first union meeting of April 25, and prior to the second union meeting, which was held on April 28.

[28]Hartmann said that at the time of the events relating to the union campaign occurred both Aikins and Parrish were members of his "group," that is in the group of route salesmen under his supervision. Parrish testified that at the time of the hearing William Marty was his supervisor.

[29]He had, however, previously attended a union meeting and signed a card.

Aikins and Parrish said that after the interrogations as to whether they had attended the union meeting and signed a union card, Hartmann discussed working conditions in the plant and pointed out the benefits they enjoyed in the way of "the present pay, the hours, pensions, hospitalization and so on." Hartmann as a witness made no denial of the testimony of Aikins and Parrish, and based upon my observation of them as witnesses, and considering the type of interrogation and interviewing by supervisors then going on in the plant, I credit their testimony.

When Hoagland came into the plant the afternoon of April 28 "after" his "route was finished" for the day, he was called into the office and discharged by Miller, the sales manager.

On the night of April 28, the second union meeting for employees of Respondent was held. Saier said "there was quite a large number (of the Coca Cola employees) present . . . I would say over 50 . . . about half and half white and colored . . . the majority of the white employees at the meeting were driver-salesmen . . . and the colored employees" were workers "in the production part of the plant . . . there were also representatives of the advertising and cooler departments present. Kamenish said that at this meeting "they got a lot more cards signed and . . . we decided" to try "to organize the whole plant, all the different departments." McCoy, one of the basement workers, said that, at this meeting, "they were trying to get some ideas of what the employees wanted, and see if there were enough that would sign authorization cards to petition the National Labor Relations Board," and that, on that occasion, "our bunch in the basement (the colored basement workers) . . . selected Thomas Brooks to be our spokesman," that Brooks was selected as the representative of the colored workers because "he knew

. . . more about it (the union) than the rest of us," and they (the colored workers) could submit to him any "questions" or "ideas" they had and "he could possibly straighten out" such matters and it was agreed, that he (Thomas Brooks) was to act as the representative and spokesman for the colored employees "in future union meetings," and in dealing with the Union in the course of the organizational campaign. Saier further said that "more cards were distributed to some" of those present, "including" Thomas Brooks, and Kamenish "for obtaining the signatures of other employees."

G. From April 28 to and including May 5

While in hardly any instance an exact day or date is fixed, it definitely appears that the incidents listed under this heading occurred, or are said to have occurred, during the period from April 28 to and including Saturday, May 5, Derby Day.

Carnie Brooks, brother of Thomas, testified that on Friday of "the following week after" the union meeting of April 28, which would have been May 4, "I was on the platform on the south side smoking, it was on my relief and Carl Ferst came up to me. He said, 'I am sure surprised in you Brooks boys,' and I said, 'what do you mean'? He said, 'Don't be a fool boy, you are not going to get anything out of this union.'" Only to the extent that

he denied generally that he ever at any time made any inquiry of, or initiated any conversation with, any employee about the Union is this conversation with Carnie Brooks denied by Ferst. I credit Carnie Brooks' testimony concerning the remarks he attributed to Ferst.

George Miesback, a route salesman, at the time, related an incident or conversation involving Miller, the sales man-

ager, which occurred shortly after April 28. The approximation of the time is arrived at from the context. It is apparent that it occurred after the union meeting of April 28, and Mialback said "right before" the time of the incident "Delmar Hoagland got fired," which was April 28. Mialback testified as follows: "Just after I cashed up" that day, and "was getting ready to punch the clock," Miller "asked me to step in his office"; he (Miller) said "he wanted to talk to me"; in the office Miller said, "I heard you have been going around trying to talk men into joining the Union," and "I kind of grinned, and he said, 'I don't care what you do on your own time and when you are not on company time.' He said he didn't want to hear about me talking to any men and getting men off during working hours;[30] he asked me if I attended (union) meetings, and I said I just went up there (to the union meetings) to find out what was going on . . . I didn't want to come right out and say I was a member of the union and was trying to organize it because right before that Delmar Hoagland got fired, and I had just got married, at the time, and didn't want to lose my job"; and "he told me, 'Some of the ones that you think are on your side are not exactly on your side, because they came and told me you are one going around trying to talk them into joining the union'", also "He told me" that "after you arrived", at "one of the (union) meetings at the labor hall Frank Kamenish came in right after you did."[31] Miller, as a witness for Respondent, said he could not "recall" or "remember any such conversation" as that related by Mialback, and that he "did not make" the "statement" to Mialback that "I

[30] It was nowhere claimed that Mialback or for that matter any other employee had solicited for the Union on company time or during working hours, or in promoting the Union had interrupted or interfered with their own or the work of other employees.

[31] Meaning that he had been informed or knew that Kamenish arrived at the union meeting "right after" Mialback got there.

know what you are doing. Kamenish came in right after you in the meeting," and further that he never "had any conversation with Mialback at all concerning the union, union cards, or union meetings." I observed the demeanor of Mialback as a witness and had, at the time, a distinct impression of complete disinterestedness. No indication is to be found anywhere in the evidence that Mialback, who had voluntarily quit his employment there in May to go into business for himself, and whose "services," Miller said, "were satisfactory," ever had any trouble with the Company or any of its supervisors, or had ever had, or then held, any animosity toward Miller or the Company, or of any motivation which might likely impel him to favor the union in this controversy to the extent that he would stoop to fabricate the testimony he gave concerning this incident, and I credit his testimony.

The next incident during this period, it occurred during the first week in May, does not involve any question of credibility as between or among the witnesses. Route Manager Hartmann[32] said that "a number of employees . . . several of them . . . members of" the "group" of route or driver salesmen working under him as route manager "came" to him "and said they would like to get out of the union," and "wanted to know how they could get out of it," and that at the same time these route salesmen "stated that they would like to sign something" in the nature of a "petition" or "paper" which he later caused to be circulated. Asked to name the route salesmen who had thus appealed to him as their route manager to help them get out of the union with the suggestion that some kind of "petition" or "paper" to that effect which

[32] At the time of the hearing Hartmann had been in the employ of the Company 19 years and had been a route manager "about 3 years." Hartmann testified as a witness for the Respondent.

they could sign be prepared, Hartmann declined to do so saying, "one of the fellows is a personal friend" and "said, 'don't mention my name,' and the other fellow said he wanted some information, and I promised them I wouldn't involve their names. Here was two in that one day." At this point it appeared that he was saying that at most two of his route salesmen had made these appeals to him, but asked if there were others, he said there "could have been maybe one or two others, as time went on." Moved by a desire "to assist" these men, Hartmann said "I signified to Mr. Miller that some of the fellows (in his group) had come to me about getting out, wanted to see if they could do something that way, didn't want to be involved in any union activity, and he (Miller) said 'Well, we will see what we can do about it.'" According to Hartmann, a "couple of days" after he spoke to Miller about the matter he found a "paper" on his desk. He claimed he did not know who "wrote that paper," or who put it on his desk, or how it got there, "it was just lying there," nor could he recall or "remember" how the heading or written matter on the paper read but thought "it said, 'I don't want to be represented by any organization' or 'any outside organization.'" At another point he said this paper "signified that they (the signers, if any) wanted to get out of it (the union) and didn't want to have anything to do with it."

As to what Hartmann did with this "paper," I note first the testimony of Robert Clifford Yeager, "a delivery (or route) salesman," a member of the group of route salesmen working under Hartmann's supervision as route manager. At the time of the hearing Yeager had worked for the Company 37 years. Yeager said that "sometime around May 1st" Hartmann "brought a paper up there".

where "I was checking up and asked me to see if any of the boys would care to sign it." Asked "what was on the paper," Yeager said "I don't exactly remember it all but it was something about, 'we, the undersigned, do not want a labor organization,' or something like that, . . . it wasn't addressed to nobody." Yeager "asked about three of the boys,"[33] Atwell Altsman, Joe Parrish, and Tom Aikins, "if they would care to sign it," at the same time telling them that "the route supervisor" (Hartmann) had given him the paper and "asked" him "to see if some of the boys cared to sign it." The three fellow route salesmen "looked at it, and just handed it back" saying "they didn't want to sign it." Yeager said, "I quit on those three," nor did he sign the paper himself, and the "next morning as" he "went out" he "left it with the checker," the man "who checks the trucks out in the morning," and "told him to give it back to Hartmann," and has not seen it since. Both Parrish and Aikins testified about Yeager presenting the paper to them. Parrish, Aikins, and Altsman were together at the time. The testimony of Parrish and Aikins about the incident is pretty much the same as that of Yeager. Aikins' best recollection about how the heading read was that "it said something to the effect, 'we, the undersigned do not want this union at this time.' "

The "next day" after Yeager left the unsigned paper with the checker with direction to give it to Hartmann, Miller, the sales manager, the head of that department, and over Hartmann and the other route managers, remarked to Yeager in a questioning form, "I believe you didn't get any signers," and Yeager replied, "no, the boys are kind of scared to sign it . . . and I just turned it back in," whereupon Miller said, "don't worry about it, some of the

[33] Also members of the group of route salesmen under Hartmann's supervision.

Saturdays, the three leaders of union organization and activity in the plant were terminated at the rate of one per Saturday.

Before going to the next section of this Report I comment further on the testimony of Ferst who has to this point figured so prominently in the testimony reviewed. It is somewhat taxing upon credulity, to find Ferst claiming that at the times about mid-April and immediately thereafter when he observed groups, both of the colored employees and route salesmen, talking, only to disperse when he approached, which caused him merely to think everybody was "mad" at him, and that at the time of the Davis interview, and the two company meetings and Schmidt's speeches, on April 25 and 26, and the union meeting on April 25, he had not learned, and did know, that there was union talk in the plant, and that the first he heard about union talk "among the boys in the plant" was when Saier "was there with his handbills"[35] announcing that a union meeting would be held on the night of April 28. However, these avowals were shaken by his own slight admissions creeping in here and there, and of course refuted by established and indisputable facts and circumstances appearing in the evidence. Then Ferst undertook to say that he never at any time asked any of the employees "about the union" or "whether they were members of the Union or not," but confronted with his acknowledged affidavit stating that he "may have asked three or four people in a kidding way if they had signed up with the union," he testified that he "had asked" employees "in a kidding way whether they had signed up for the union" but "nobody answered."

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[35]Which was after April 25 and before or on April 28.

I. Conclusions and Findings on 8 (a) (1) allegations of the complaint

As I have pointed out the Company's officers and supervisors learned of and knew about the union campaign almost from the beginning, and it is quite apparent that from day to day they became, kept, and were pretty well informed about the union activities. The facts found show that the supervisory staff manifested and maintained a distinct and well known opposition to the Union throughout in the form of interrogation of and accusations against employees, antiunion declarations and suggestions, and remarks, under circumstances and so framed as to carry implications of a threatening and coercive nature, and other acts and conduct of a similar import. Thus there was a course of conduct and action on the part of the supervisory staff well calculated, in violation of Section 8 (a) (1) of the Act, to interfere with, restrain, and coerce employees in the exercise of their right to self-organization, and to form, join, or assist a labor organization in the plant.

I find the following to be violations of Section 8 (a) (1) of the Act.

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Interrogation

The calling of Richard Davis, on the carpet, so to speak, by Schmidt, the general manager, and Ferst, the production superintendent, under circumstances, heightened by what they said on that occasion, calculated to, and which did, cause Davis to believe he was being, or was about to be, fired and questioning him, in an accusatory manner, about his own union activities and relationship to the union movement and about union activities among the colored employees working in the basement, and what they wanted

"in organizing a union";

Sales Manager Miller's inquiry, on April 25, of Aikins, a route salesman, whether he "was going to the union meeting that night";

The interrogation of Hoagland, by Ferst, on April 27, about, and taking him to task for, "talking" to the employees "about a union";

Route Supervisor Bunning's interrogation of Kamenish, one of his route salesmen, about 2 days after the first union meeting held on April 25, as to whether he had attended the union meeting and when Kamenish answered he had, Bunning asked him if he had signed a card. While Kamenish was one of the first to sign a union authorization card, having been the first to join up with Hoagland in promoting the Union, his apprehensions moved him to tell Bunning that he had not signed a card. The Union was the sole subject of Bunning's remarks on that occasion;

Bunning's questioning of Lueke, another of his route salesmen, on April 28, as to whether he had "signed a union card" and attended the union meeting (of April 25). When Lueke answered both questions in the affirmative, Bunning asked him if he (Lueke) "thought that was the right thing to do," at the same time saying that he (Bunning) "didn't think it was right." The evidence indicates that Bunning sought out both Kamenish and Lueke for the sole purpose of raising the question of the union with them. Further light is shed on Bunning's purpose or motive, and that of other supervisors, in questioning and talking to the employees under them about the Union, when it is recalled that Bunning admitted that he talked to "a lot of" the route salesmen working under him in an effort to "to get" them "off the Union's side" and "on the Company's side";

Route Manager Hartmanns individual interrogation,

"right after" the first union meeting held on April 25, of Aikins and Parrish, both route salesmen working under him, when they were together in the locker room, whether each had attended the union meeting and had signed a union card. In answer to his questions Aikins told Hartmann that he had gone to the union meeting but that he had not signed a card, although in fact he had done so, while Parrish answered both questions in the affirmative;

Sales Manager Miller's calling Mialback, a route salesman, into his office and questioning him "right" after April 28, the date Hoagland was fired and of the second union meeting, as to whether he had attended any union meetings. In view of the fact that he was a member of the Union, "was trying to organize it," and "right before that" Hoagland had been fired, Mialback, becaming apprehensive, made an evasive answer to the effect that he had gone to a union meeting "just to find out was going on";

Ferst's interrogation again of Davis, the colored basement worker, sometime shortly prior to May 12, when he approached Davis with the accusatory question "You are one of the leaders, are you the main one," the reference being to union activity among the basement workers as Ferst made clear by his added statement, "You know what I am talking about," which Davis well understood.

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Here are not one or two isolated and incidental questions occurring in a casual conversation between a supervisor and one of his men with no other facts or circumstances in evidence showing other unfair labor practices present in the case, but rather a number of interrogations going to the relationship of the employee, and his fellow employees, to the Union and the union activities going on among the employees, made with apparent design, on occasions, in sur-

roundings, and under accompanying circumstances reasonably calculated to, and which did, in many instances, arouse apprehension on the part of the employee subject to such interrogation that some form of reprisal might be visited upon him because of his union activities, or if he participated therein. It will be noted that, in the instant case, Kamenish and Aikins denied outright that they had signed union cards, although both had; Mialback, realizing the sales manager knew he had attended union meetings gave an evasive answer trying to minimize his attendance at such meetings when asked if he had attended, and when his foreman questioned him as to whether he had signed a union card, McCoy also gave an evasive answer; and, as will be mentioned later, Thomas Brooks, although at the time the leader in the union activity among the colored workers baldly denied that he had as much as heard anything about a union in the plant when questioned by the superintendent of his department. The basic rationable rendering such interrogation as occurred here violative of the Act has been more recently restated by the Board in Syracuse Color Press, Inc., 103 NLRB No. 26, and in that connection see also Standard Coosa-Thatcher Co., 85 NLRB 1358. I mention but one phase of the Board's rationale found in Syracuse Color Press, Inc., supra, to the effect that since the Board's ruling, set forth in repeated Board decisions, that "an employer's open or secret surveillance of union activities of his employees, because it tends to inhibit such activities, violates Section 8 (a) (1) of the Act" has been affirmed and established by many Court decisions, some of which are there cited, that "manifestly" interrogation such as found in that case, and here present, "is but a special, highly individualized, form of surveillance," for "whether an employer attempts to identify union adherents by observing union meetings or by questioning his employees" individ-

nally "concerning their union membership and activities, the normal and natural tendency of such conduct is to interfere with, restrain and coerce."

Threats of reprisal

Sargeant, the basement foreman, interrogated McCoy, one of the colored basement workers on the afternoon of April 26, as to whether he had signed a union card. When McCoy evaded a direct answer by saying that if a majority wanted a union he wanted it too, Sargeant said, "You might lose your job over it." This suggestion of reprisal was clearly intimidatory and highly coercive.

Of the same cloth were Ferst's statements to Thomas Brooks "a few days before" Brooks "was fired," when he approached Brooks at his place of work in the basement, and after telling Brooks he wanted to see him later in Schmidt's office (the general manager), which in itself with no more and under the prevailing circumstances, and in view of what followed, was significant, said "I know you are mixed up in this business down here," referring to the union activity going on among the colored basement workers, and, then and in that connection, "I don't think I am going to want you in the evening anymore," meaning he was considering taking away Brooks' overtime work, and when Brooks made no reply Ferst, in continuation of his statements in connection with his observation that Brooks was "mixed up in" the union activity said, "I don't think I am going to want you around any more at all," meaning, as a few days later did occur, that Ferst was considering dispensing entirely with Brooks' service because of his union activities. This declaration that Ferst, the superintendent of production, was considering firing him was a clear threat of reprisal against Brooks for his union activities and was certainly calculated to restrain and coerce

boys are probably afraid they will get themselves in trouble if they sign it."

Hartmann said that when he gave the paper to Yeager he told Yeager "if they signed the paper or if they didn't to get it back to me," that after delivering the paper to Yeager he next saw it "a day or two later"

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when he discovered it "hanging on my file," and "there were no signatures on it." When asked what became of this paper and its present whereabouts, Hartmann said, "I don't know. It was hanging on my file for a couple of days, and it disappeared, and I don't know what happened to it," in other words the first time Hartmann saw the paper "it appeared on" his "desk," and after its return by Yeager "it disappeared from" his "desk." He "was going to give the paper to" Miller.

Hartmann said that Yeager was not one of the two or "maybe" more salesmen who had spoken to him about renouncing the Union and any interest in it, and in whose behalf he had taken the matter to Miller and received his assurance that "we will see what we can do about it," culminating, as is circumstantially indicated, in the paper which "appeared" about 2 days later on Hartmann's desk. So far as appears this paper never was presented to, and never reached, any of the salesmen who Hartmann claims appealed to him, and in whose behalf and to assist whom he and Miller initiated the paper. It is puzzling that, as Hartmann admits, "instead of giving the paper to these people who had spoken to" him he "gave it to Mr. Yeager who had never spoken to" him "about the matter," nor did he give Yeager the names of those "who had spoken to" him "and wanted to sign" such a "paper." Asked why he gave the paper to Yeager "instead of to one of the persons," who he claimed had appealed to him for his

assistance, Hartmann said, "I happened to see Yeager first . . . he happened to be up there when I had the paper." In this connection Hartmann said at another point, "I just more or less had the paper and gave it to Mr. Yeager, and told him if he wanted to sign it he could, and if anyone else wanted to they could."

The fact that Hartmann did not contact, and did not make the paper, which Miller had prepared, or caused to be prepared, available to the two or "maybe" more unnamed driver-salesmen, members of his own group, who he claims appealed to him for his assistance, and at whose request this written disclaimer was prepared, leaves me dubious that such in fact occurred and was the sole motivation prompting Hartmann and Miller in the preparation and circulation of this paper, but, I think it immaterial whether it was or not, since the fact remains that Hartmann and Miller did purpose and attempt to get the driver-salesmen members of Hartmann's group by this means, to commit themselves against the Union. The matter was subtilely handled by placing the paper with Yeager, an older man with 35 years of service with the Company, who doubtless had the respect of the younger driver-salesmen, and directing him to present it to the route or driver-salesmen members of Hartmann's group, of which he was a member, making known to them that it had come from and had the blessing of their route manager. The fact that Yeager "quit" after his initial effort met with no response and that he himself did not sign, does not in the least discount the purpose and intent prompting Hartmann and Miller in the undertaking. Despite the subtlety it is plain enough that they thought and sought by this manner to bring the indirect pressure of management suggestion to bear on the members of Hartmann's group against the Union. The circumstances indicate that the complete rebuff encoun-

tered, not even Yeager going along with them, created a considerable wariness on the part of Hartmann with professions of disinterestedness, and the tendency to clothe the origin, purpose, content, and disposition of this paper in mystery.

Saturday, May 5, was Derby Day in Louisville. In accordance with the practice on Derby Saturday, Kamenish, as well as most, if not in fact all, of the other city route salesmen got in earlier that day than normally. Before noon that day, Kamenish "was down by the time clock getting ready" to check out, when Carl Bunning, Sr., his route manager, directed him to report to Miller at the office. Reporting to Miller, Kamenish said he was discharged while Miller said that he undertook to reprimand Kamenish, and Kamenish "blew up" and "quit." This issue of fact will be resolved later.

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However, this brings the recital and review of events to and through May 5, with two of the most active employee leaders in the union movement, Hoagland and Kamenish, terminated.

H. From May 5 to and including May 12

The evidence indicates that it was somewhere in this period that, according to the testimony of Richard Davis, the nearby blind colored basement worker, who Ferst and Schmidt had interviewed about the Union shortly before April 25, and whose testimony in this respect I credit, Ferst "approached" Davis "upstairs . . . at the east end of garage where" Davis "was standing" and "smoking" and said, "you are one of the leaders, are you the main one?" Davis replied, "Leader of what?" Ferst said, "You know what I am talking about," and "walked away." Thus it appears, and he may well have had in-

formation which he felt confirmed that belief, that Ferst still persisted in the conviction, which he and Schmidt in the form of accusatory questions had announced during the before work interrogation or interview, of Davis a few weeks previously, that Davis was active in promoting the Union among the colored employees, as Davis may have been.

By letter dated May 7, and received by the Company on May 8, Saier advised the Company that, "The overwhelming majority of workers (maintenance, production and delivery) employed at your plant has seen fit to sign cards designating" the Union "as their collective bargaining agent," and requested the Company "to set a date for a conference," etc. for the purpose of negotiating "a collective bargaining agreement." Under date of May 10, the Company by Schmidt replied to Saier's letter stating, "This company does not believe that your union represents even a substantial portion of its employees. If you desire, you may contact the company's counsel," giving name, and address, and telephone of counsel, and closing with, "You are to understand that this does not amount to a recognition of your union in any capacity whatsoever."

It seems that for some time prior to about the first of the previous March, Lavell Brooks, brother of Thomas, had in addition to his full time job, held a job which gave him "on all days the machines run," w[redacted] was "daily" except perhaps some Saturdays, "half an hour overtime work" immediately following the regular quitting time. When "around March" Lavell decided to "quit this overtime work," he and Thomas talked with Ferst about letting Thomas have the "extra half hour" which Lavell "had been getting." Ferst gave Thomas the overtime job, and he worked "steadily" at this extra job from around the first of March "until" he "was fired" on May 12. Thomas

Brooks testified, that "a few days before" May 12, Ferst came to him where he was working in the basement and "said, 'I want to see you after while up in Bud's office (Schmidt's), and I never said anything. He (Ferst) said, 'I know you are mixed up in this business[31] down here.' And so I never said anything. So he said, 'I don't think I am going to want you up here in the evening any more.' He was talking about the overtime. Then he said, 'I don't think I am going to want you around any more at all.' So, I still never said anything because I didn't want to bring on getting fired. . . . Later on he came back and patted me on the back, and said, 'Forget what I said to you.' Then still later that day, he sent Mr. Sargeant (the basement foreman) to tell me I could go on with the overtime job." I am satisfied that such an incident occurred and that the foregoing testimony of Brooks substantially relates what was said and done, and this despite Ferst's testimony that he did not "remember" such an incident or "remember" saying or doing the things, in this instance,

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attributed to him by Brooks. For reasons heretofore partially stated I have not been able to accord much in the way of credit, weight or value to Ferst's testimony particularly where it is in conflict with the testimony of a witness whose testimony has the earmarks of truthfulness, and whose demeanor, and manner as a witness, and the consistency of whose testimony with known facts and circumstances, was such as to indicate forthrightness.

On Saturday, May 12, Ferst told Thomas Brooks to come to his office "before you leave" for the day. When later that day Brooks reported to Ferst, as directed, Ferst discharged him. Thus with the passage of three successive

[31] The reference was to the union organization campaign, and was intended by Ferst to be and was so understood by Brooks.

him,

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as well as other employees who may have heard about the incident, in the exercise of the right to join and assist in the formation of a union.

Ferst's statement to Thomas Brooks shortly after the first union meeting, held on April 25, that the Company "wouldn't have a union" in the plant "and wasn't going to stand for it," was in the nature of a threat, or at the least was calculated to be coercive in effect.

Other 8 (a) (1) conduct

When Sales Manager Miller called Route Salesman Mialback into his office, apparently for the sole purpose of talking to Mialback about the union activities, he told Mialback that some of his fellow employees, whom Mialback and the union advocates thought were on their "side," had reported to him that Mialback was "trying to talk them into joining the Union." On this occasion, as further demonstrating that management were being kept, or were keeping, informed about individual union activities, Miller told Mialback that he knew the Kamenish had arrived at one of the union meetings "right after" Mialback entered the labor hall where the meeting was being held. The representation that management was aware of, and was being informed about, the employees union activities, even the activity of individual employees, thus creating and fostering the impression that management in effect had them under surveillance, was in itself violative of Section 8 (a) (1) of the Act, F. W. Woolworth Company, 90 NLRB 289, and Tennessee Egg Company, 93 NLRB 846.

A day or so after the first union meeting Ferst interrogated Thomas Brooks, prefacing his inquiry with an admonition that he wanted Brooks to tell him (Ferst) the

fruth because he trusted him, as to whether Brooks had heard anything about the union. When Brooks, who was in fact even at the time one of the leaders in the union campaign, told Ferst he had not, Ferst directed Brooks to let him know in case he did hear anything concerning the Union. The fact that Brooks did not make any such report to Ferst does not detract from the violation of Section 8 (a) (1) found in the interrogation of Brooks and the attempt to use him as a source of information about the union activities of his fellow employees.

The "paper" which Hartmann and Miller originated, prepared, and caused to be circulated with their endorsement, even though its circulation, due to circumstances was very limited, signifying, as Hartmann put it, that an employee signing it "wanted to get out of" the Union, "and didn't want to have anything to do with it," was an act on the part of management well calculated to interfere with, restrain, and coerce employees within the meaning of Section 8 (a) (1) of the Act. It was a deliberate attempt by Miller and Hartmann to ascertain the union sentiments of the route salesmen working under Route Manager Hartmann, and was in effect an attempt to solicit those employees to declare in writing for the information of management where they stood on the union issue. Nina Dye Works, 95 NLRB 824, however, the basis of this finding is so well established that the citation of specific Board decisions hardly seems needful.

J. The discharge of Hoagland

Hoagland at the age of 19 years was first employed by the Company on January 31, 1941, and worked as "a helper" and "junior salesman," assisting "the truck driver in deliveries" until July 22, 1942, approximately 18 months, when he voluntarily quit "for a better job" elsewhere. There is

nowhere in the evidence any indication that Hoagland's work during this period of service was not satisfactory. Miller, the sales manager, said the Company's records show that Hoagland next worked for the Company "seven days" in the fall of 1942. Miller said Hoagland was not terminated, but after working 7 days "just didn't come back the next day." Nothing was said about the nature or quality of his work during this short period. May 12, 1944, Hoagland was again employed by the Company, and this time worked as a route salesman for about a month when he resigned to go "into the Army," leaving his "employment . . . three or four days before" he "went into the Army."

In late August 1950, Hoagland went to the company plant seeking employment. According to Hoagland he "called at the plant that day to see" Miller, the sales manage but "he wasn't in," and he then went to see Ferst[36] and asked Ferst "if he knew whether" Miller "had anything open in his department." Ferst "said he didn't know but would see" Miller "and see if he had anything" and in "the next day or two" Miller "called" Hoagland and "asked" him "to come to the plant" and Miller put him to work about September 1 or 2 as a "telephone driver-salesman." Ferst's testimony about this last hiring of Hoagland was, that Hoagland applied to him for a job but he "did not have anything at that time"; that he recalled that Hoagland's last work there had been in the sales department so he (Ferst) went to see Miller about a job for Hoagland in that department; that Miller said he "had a bad experience the last time" Hoagland "was there," but Ferst "persuaded him (Miller) to put" Hoagland "on . . . in the sales department."

[36] As has been stated, Ferst was, and is, superintendent of the production department, and was sometimes referred to as the plant superintendent."

Miller's version is somewhat different. He said that when Ferst spoke to him about giving Hoagland a job, Ferst said Hoagland "was hard up" as he "had lost a job tending bar," and "he (Ferst) wanted me to give him a job, which I refused." Miller then stated that the reason "I did not want to hire Hoagland was because I knew for a fact he had been working in saloons where they had handbooks," and "I assume he was hand book clerk and a bartender. You could do both jobs." Miller said he had been in these saloons where Hoagland was working as a bartender, however, he had never witnessed, and did not personally know of any connection on the part of Hoagland with handbook or gambling transactions. It will be noted that Miller did not assign as the reason for his purported reluctance to hire Hoagland any dissatisfaction, as Ferst said Miller gave him, with Hoagland's work as a route salesman when he had last worked there in 1944, 6 years before, which job admittedly Hoagland voluntarily quit at the time when Hoagland said he was called into the Army. I am inclined to the opinion, in the light of later developments in the case, that this hiring of Hoagland was not a matter of such weighty discussion, so long and gravely considered by Ferst and Miller as they now relate it? The claim found in Ferst's testimony to the effect that Miller's purported refusal to hire Hoagland because his services in 1944 as a route salesman had not been satisfactory, which was not corroborated by Miller who assigned another and totally different reason, is the only thing found in the evidence that remotely reflects upon the quality of Hoagland's prior employment at this plant.

I have heretofore described the duties and work of the "telephone salesmen," suffice it to say it is a sort of a beginner's job and where it is on a full time basis, as in Hoagland's case, usually leads to a route salesman's job as openings occur. Miller stated that "training as a telephone

salesman" sufficient to qualify for a route salesman's job

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is "anywhere from 1 to 2 months up to 4 or 5 years."[37] After working "about a month" as telephone salesman, Hoagland was made a route salesman and given a class D route, known as the English route,[38] "all in rural territory." Routes are classified as, A, B, C, and D, with the A routes "being the highest paid and most sales, and B, C, and D routes being progressively less in sales and in base compensation." This English route was one of the routes under the supervision of Hartmann, as route manager. Hoagland considered this a promotion, as undoubtedly it was, since in addition to an increase in base pay over that received as a telephone salesman he received "every week" a commission on each case of coca-cola sold on his rout "and a safe driving award." Miller and the route managers did concede that Hoagland was a good truck driver.

After he had worked on the English route "about four months," a notice was posted "on the bulletin board that" Miller "would accept bids" for the Haymarket Route, which was "open." It was the practice when routes "were open" to post such a notice affording any drivers desiring to apply for the route an opportunity to do so.

While the Haymarket "paid about the same" as he was earning on the English route, Hoagland thought he would prefer that route, which was all in the city of Louisville[39] over the English route, which was "a country route," and,

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[37]This is the reading of the transcript. The "four or five years" seems, as I understand the duties of a telephone salesman, somewhat exaggerated. However, numerous corrections of this transcript were made upon stipulation of the parties, and this item was not changed.

[38]The route takes its name from the town of English, Indiana, which seems to be the terminus of the route. English is about 45 miles "almost due west of Louisville."

[39]It is spoken of as being in the "west end" of the city of Louisville, and was also known as "West End Route No, 2."

in response to the notice for "bids" on Haymarket, he applied for that route. His "bid" was accepted and he was awarded that route.

Hoagland had been on the Haymarket route about 6 weeks when Clarence Lowen, the route salesman then on the Shepherdsville and suburban route quit, and that route was "put up for bids." That route, referred to as the S and S, is a class C route and pays "more money" than does the English or the Haymarket route. Hoagland was "one of the bidders" and "got the route." The S and S route, "a country route," was one of the routes in the group supervised by Route Manager Raymond Sheehan. Hoagland testified that when the applicants or "bidders" for the S and S route were being considered Sheehan "told me that he and Mr. Miller had been talking and that he (Sheehan) told Mr. Miller that he thought I would be the best man for that route out of the ones that had bid for it. I don't know how many that was." I credit Hoagland's testimony that Sheehan made such a statement to him, as, for one reason, Sheehan did not deny that he told Hoagland what Hoagland said he did, saying only that he did not tell Miller that he (Sheehan) "thought Hoagland was the best man" Miller "could get for the S and S route," while at the same time admitting that he "recommended" that Hoagland's "bid be accepted as against the bids of the other drivers" because "Hoagland could handle a truck, drive it over country roads whereas" he "feared the other boys could not." Miller said that Hoagland took over the S and S route "about March 10, 1951," while Sheehan fixed the date as Thursday, March 15. This was approximately a month before Hoagland initiated and took the lead in the union activity among the Company's employees, both route salesmen and production employees, particularly the colored production workers.

Before he was "called into the service" Bobbie Olliges was the regular route salesman on the S and S route.[40] Hoagland testified that at the time he "got this Shepherdsville and suburban route" Miller told him "it would probably be temporary because Olliges would get this route when he returned from the Navy" but that he (Hoagland) would then get his "old route (the Haymarket) back," and that he ((Hoagland) "agreed to that." Miller did not deny that this conversation occurred or that such agreement or understanding was had at the time Hoagland took over the and S route, and I credit Hoagland's testimony in that respect. I cannot and do not credit Sheehan's testimony, which is not corroborated by any other witness, as if such had been the case it very well could have been by Miller, nor do the circumstances lend corroboration while the credited testimony above set out tends to refute it, that the notice "posted on the bulletin board," early in the first part of March, that the S and S route was open and that bids would be received "stated that Olliges was going to get it on the 28th day of April (a Saturday, and the day Hoagland was discharged) when he came back."

It seems to have been a practice for the route salesman before returning to the plant, after completing his route or nearly so "to call in to see if" any of their stops have reported being "missed," or if there is "any one" on their route who needs additional supplies of coca-cola. On Saturday, April 21, Hoagland, before returning to the plant for the day, made the customary call and John E. McHugh, the checker, told him that no calls had been received, and that Miller "wanted to see" him when he came in to the plant. When he arrived at the plant he found Miller in McHugh's office. McHugh

[40] At the time this S and S route was given to Hoagland, Olliges was still serving in the United States Navy.

was present and heard what was said and Hoagland related Miller's remarks on that occasion, in substance, as follows: Miler "said that he had some bad and some good news for me; that Bobbie Olliges was coming back . . . . the following week and Olliges would then get" the S and S route, and "I would take my old one back," (the Haymarket); that the "change-over would be effective a week from the following Monday" (April 30); and that he could take the Haymarket route back "at the same pay" he was getting on the S and S route, that is, he "would get class C pay" for a "class D route," but "he told me not to say anything about it." About this April 21, conversation Miller said he told Hoagland that Olliges "would be back" on the S and S route on Monday, April 30, and that "we probably were going to terminate him (Hoagland) on the 28th" (Saturday) whereupon Hoagland "requested that he be permitted to go back to the Haymarket route" on Olliges' return to the S and S route, and "I told him if his work improved" (during the intervening 1 week) "I might consider it . . . . but his work did not improve." At another point Miller put it this way, "I told him" that "I was going to terminate him on April 28 if his performance didn't improve." Miller further said that he did not tell Hoagland that on returning to the Haymarket route "his compensation would be held up to the compensation of the S and S route." As McHugh related the conversation Miller "told Hoagland that Olliges was coming back out of the Service" and that Hoagland "might go on his old route if his work improved." McHugh said further that "as I remember, there was no talk of money at all, or classification" relating to Hoagland's old route.

Omitting what he claimed about a promise that he would continue to receive the same compensation upon returning to the class D, Haymarket route as he was receiving on the class C, S and S route, Hoagland's version of Miller's

statements and action on this occasion has Miller conforming to, and but carrying out, the assurances, which I have found, and which stand undisputed, were given by Miller to Hoagland about March 10, when he was put

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on the S and S route after being selected over "the other bidders," that is, that when Olliges returned he (Hoagland) would get the Haymarket route back. Neither Miller nor McHugh indicated that Miller mentioned any deficiency in Hoagland's work, or in what respect it would be necessary for him to improve his work in the 1 week remaining before Olliges was to take over the S and S route in order to return to his old route as had been promised back in March. It seems odd indeed that after Hoagland had served as a route salesman 4 months on the English route, and approximately 1½ months on the Haymarket route, and had then been selected over "the other bidders" for the S and S route, and had served that route for approximately 6 weeks, that Miller should condition his retention by the Company on 1 more week's trial, and that Hoagland would not so much as even ask Miller what was meant by improvement in his work, or in what way his work was unsatisfactory, or in what respect such improvement was required.

I doubt not that by this time (April 21) Miller may have had some mental reservations about Hoagland but I doubt that he gave expression to them in the language which he and McHugh claimed he used or that these reservations were based on Hoagland's work. I have earlier described the inception and progress of the union organizational activity among the employees during the first period of from about mid-April to and including April 25. From my findings in that respect it appears that in the approximately 1 week that had elapsed by this date (April 21) there had been considerable union activity, of which Hoagland had

been the originator and prime leader, and that knowledge of such activity was widespread and general among both the employees and management. Schmidt admittedly learned of the union activity between April 15 and 20. True management may not have as yet learned by April 21, the nature and full extent of Hoagland's participation in and responsibility for the union movement which by that time was well underway but I think it reasonable to infer, in view of the mass of circumstances I have detailed, that by this time management had learned at least that he was one of the leading union advocates. While Miller's purported language was gone over several times with both Miller and McHugh, and each stated and restated that Miller conditioned the retention of Hoagland at the end of the 1-week trial on "improvement" in his "work" during that week, at one point in the cross-examination Miller said that he told Hoagland, on April 21, that "he (Hoagland) may go to the Haymarket route" when Olliges returned on April 30, "if his conduct and everything else improved." There was no sort of an explanation of what was meant by "conduct" or "the everything else," if indeed he ever made any such or similar statement.

According to Miller, and evidently offered as an explanation, or one explanation, of the discharge of Hoagland on April 28, 1 week later, Hoagland's "work did not improve" during the trial week of April 21 to 28. No specific delinquency, neglect, or failure in connection with his work or anything else on the part of Hoagland during that week was mentioned or cited by Miller or any other person connected with management. However it is significant that during that week the union movement gained added momentum, and as appears by the detailed chronological recital and findings which I have heretofore made was in full bloom by April 28 when Hoagland was discharged, and as repeatedly

noted, because it is an inescapable fact in this case, Hoagland had been largely instrumental in bringing the union movement to this stage.

It will be remembered here that continuously from mid-April, Hoagland had been busy in promoting the Union among the employees, and acting as liason with the Union, supplying his coworkers Kamenish and Thomas Brooks with union authorization cards, and conferring with them "quite often" about forwarding the union campaign, and in talking up the Union and soliciting the employees, particularly the route salesmen, to sign union authorization cards and to attend union meetings. During the

week of April 23 to and including Saturday, April 28, the day of Hoagland's discharge, a number of incidents involving the union campaign and, in some instances, directly or indirectly, Hoagland's relationship to it, occurred. The first part of that week the Union "through" Hoagland announced the first union meeting for employees to be held the night of April 25, and by "word of mouth" Hoagland, Kamenish and Brooks notified the employees of the meeting. About this time in that week Schmidt and Ferst had Davis in the office for an early morning interrogation about the union activity among the colored basement workers. Came the late afternoon of April 25 and the hastily called company meeting for sales employees at quitting time, whereat Ferst, undoubtedly well knowing by that time what was going on, asked, "What this is all about," which clearly, under the surrounding circumstances, referred to the union activity going on in the plant, and demanded of Hoagland, calling him by name, what complaints he had. The following morning, April 26, came the before work, and on the moment called, company meeting of the production em-

ployees. The next day, April 27, finds Ferst rebuking Hoagland for his union activity, and later during the same day telling him that management "knew all about" such activity on his part. Also during this week preceding Hoagland's discharge on Saturday, April 28, there had been, as heretofore set out, a number of instances of interrogation by Route Managers Bunning and Hartmann and Sales Manager Miller of route salesmen working under them concerning the Union, and their connection with it, if they intended to, or had attended union meeting, or had signed union cards. I have in mind too Miller's statements to route salesman Mialbach indicating that some employees who the union supporters thought were "on" their "side" were feeding him information about union activities and who were participating in them, even by way illustration about the attendance of employees at union meetings and the order of their arrival at the meeting.

Upon the facts as I have found them I perceive little, if any, room to doubt that by, and indeed well before, April 28, management had learned of and well knew Hoagland's role in the union movement, and this brings the course of events in respect to Hoagland to his discharge on that date.

About his discharge the afternoon of April 28, Hoagland testified as follows: When he came in that afternoon "after my route was finished, I was told that Mr. Miller wanted to see me in his office. . . . I went in and he says, 'Hoagland we are terminating your employment,' and I says, 'What's the reason?' and he says, 'There is no reason at all, it is just terminated, and let's just forget about it right there.'" Hoagland then told Miller that discharging him "wouldn't do any good . . . wouldn't help him (Miller) any," about the Union in the plant, "because the majority of the men wanted the Union" whereupon Miller

said, "We won't talk about that, I don't care to discuss it." Miller "offered" Hoagland "an extra week's pay" saying "employment would be hard to get because that was Derby week," and he "would like to help" Hoagland "a little over that time."[41] Hoagland seems to have been leery lest by the acceptance of this proffered extra week's pay he might waive or foreclose some right, anyway he refused Miller's offer.

Miller did not specifically deny Hoagland's testimony about his discharge in any respect, nor did he either specifically or by general import deny that Hoagland sensing, or at least believing, that he was being discharged because of his union activity raised that question with him, and

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made the remarks in that connection which he said he did, only to be met by Miller's statement that he did not "care to discuss" that. Whereas Hoagland stated that when Miller greeted him with "we are terminating your employment" and he (Hoagland) asked, "the reason," Miller did not assign any reason merely saying, "it is just terminated" and "to forget about it," Miller testified: "I called him in and told him we were totally dissatisfied with his performance of his duties and that I was terminating his employment." Continuing Miller said that at that time he explained to Hoagland that he was on "a one year probation," which Miller said "he (Hoagland) knew before

[41] Hoagland said he didn't understand this explanation of the basis for the proffered extra week's pay "because jobs were not hard to get" during Derby week and "are more plentiful then than at any other time."

he was hired."[42] Miller was asked, "Why did you discharge Mr. Hoagland?" He answered, "His probationary period was for 1 year, and we terminated him because of inefficiency." The foregoing covers what Miller said about the actual discharge and his reason for same. As to the offer to give Hoagland an extra week's pay it should be noted that there is no evidence whatever indicating that it was a practice or custom of the Company to give a bonus of an extra week's pay, or any amount whatever, to employees discharged for unsatisfactory or inefficient services, nor as I understand Miller's testimony did he make any such claim. Concerning that he said that Hoagland "wanted me to continue his employment; I didn't do it. I did do this however, I took it on myself to give him a week's pay, because the following week coming up was Derby week, and I knew he would have some little difficulty getting a permanent job. . . . I offered him $70. He turned it down. . . . I just wanted to help the guy out." Later Miller said this offer "was just softness on my part, that was all."

I accept and credit Hoagland's testimony that he was called in and summarily discharged by the mere statement that he was being terminated instanter, that his inquiry as to the reason therefor was met with a "forget it," and his statement to the effect that his discharge would not "help"

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[42] Miller and other supervisors mentioned, apparently as somehow bearing on Hoagland's discharge, that all employees were hired on a 1-year probation. What this had to do with the discharge of an employee at any time because of unsatisfactory services or inefficiency whether he worked less or more than a year was not explained, nor do I perceive any difference in that respect. So far as appears from anything in the evidence a driver or route salesman was paid in accordance with the basic wage established for a route of the grade of that to which he was assigned, regardless of whether he had worked more or less than a year, and the commissions were the same throughout. Nor did the length of employment seem to have anything of itself to do with the selection among bidders for routes where vacancies occurred as is evidenced by the course of Hoagland's employment during the 8 months he worked there this last period of employment.

to defeat a union in the plant with a "I don't care to talk about that." When the union issue was raised by Hoagland, Miller did not deny, as seemingly he would have done had the discharge been a bona fide dismissal for cause, that Hoagland's union activity had a part in his discharge.

Hoagland asked Saier "would it be all right to take" the $70 which Miller had offered, and Saier advised him that it would be, whereupon "a day or two" after he was discharged he called Miller by telephone, and asked him if the offer was still open, Miller said it was, and Hoagland "went out" to the plant "and got it." Later, and after Derby Day (May 5), Hoagland went to the plant to collect "some cooler commissions" which had been overlooked in computing the amount owing to him at the time he was discharged. As he was entering the plant he encountered Ferst. Ferst "was going to run" Hoagland "out of the plant," but when Hoagland told Ferst the nature of his business in connection with which he wanted to see Miller, Ferst told him

to "Go on and see him (Miller) and hurry up about it, and get out of here, because we don't want you in the plant."

The evidence offered by Respondent as tending to support its purported judgment that Hoagland's work was so totally unsatisfactory as to necessitate his summary dismissal on April 28, is far from impressive from the standpoint of quality and substance.

Hoagland had worked only "about a month" as a telephone salesman, the very minimum time fixed by Miller in which to qualify for a route salesman's job, when he was assigned to the English route. The increase in base pay plus commissions made this, in effect, a promotion. It certainly must be assumed that his services as a telephone salesman were satisfactory as there is no word of complaint

from any source, and he was given this rapid advancement to the position of route salesman. There were a total of 57 route salesmen. It would seem that the route manager under whom a route salesman worked would be in the best position to know, and should know, whether his work was satisfactory or unsatisfactory. Hoagland worked on the English route "about four months," under Hartmann as route manager. Hartmann was called as a witness by Respondent but he offered no criticism whatever of Hoagland's work on the English route and presumably had none to make. The only least critical note about Hoagland on this English route was a reference squeezed into Miller's testimony, which was pretty well rebutted, that Hoagland "get back early from this English run."

An observation should be made at this point about the practices of route salesmen in regard to leaving the plant in the morning to go out on their routes and the return to the plant when the routes have been completed. There seems not to have been anything like fixed or exact times or hours by routes or generally about arrival at the plant on return from the trip over the route, nor could there have been. The time required to complete a trip, particularly routes in the rural areas, was dependent, on any given day, on numerous factors such a weather, road conditions, volume of business, and the number of stops to be made on that day, as it appears that ordinarily not every stop was made every day and more stops would be scheduled for some days in the week than others. Route salesmen were required to report at the plant not later than 7 a.m., and some of them, who were due to leave on their route trip at that hour of course reported earlier. Hoagland "always got to the plant early" and "usually left" there on his route trip about 6:30 a.m., which enabled him to complete his trip somewhat earlier than would have been the case

by waiting until 7 o'clock or after to start out.

The facts about the usual time of Hoagland's return to the plant while on the English route are that "on the average" he "never" got in "any earlier than 3:30 to 4:00 o'clock," and there is no basis whatever for Miller's slight and vague reference to coming in early while on that route evidencing how strained Miller's claims are in his almost lone effort to show some delinquency somewhere, sometime on the part of Hoagland. As noted, no such complaint, or any other of any nature, was made by Hartmann, Hoagland's route manager. Thus coming to the end of 5 months of the 8 months which Hoagland worked there at this time, Hoagland's work is free of criticism, and surely must have been deemed on the whole satisfactory for he was then on bids given the Haymarket, a city route, which he preferred over the English route, a country route some parts of which was over "old roads" not in very good condition. Hoagland's route manager during the approximately 6 weeks he was on the Haymarket route is not named, and as he did not appear and give an opinion as to Hoagland's work while on that route, I assume that so far as the route manager, who was in the best position to know, is concerned, Hoagland's work there must have been satisfactory. The only criticism of Hoagland's work on the Haymarket route is found in Miller's testimony that his work on that route was "lousy." Asked what he meant by "lousy" and in

what respect his work was "lousy" Miller said merely that Hoagland would ge "through with it by 1:00, 1:30, sometimes 12:30" p.m. and that a driver-salesman couldn't properly "cover an ordinary . . . . route in five or six hours and do as he was supposed to do." Although apparently the route manager, Hoagland's immediate super-

visor, had no complaint about the way Hoagland handled this route, Miller who had 56 route salesmen in his department made this one generalization about this one. No specific instance of neglect, failure, or inefficiency on the part of Hoagland while on this route is mentioned. Hoagland, who, as stated, usually started on his route about 6:30 a.m., said that he "got back" off the Haymarket "on an average of 12:00 (noon) to 2:00 o'clock," this of course dependent upon the play of factors necessarily affecting the time required, and it is interesting to note in this connection that there were 10 to 15 driver-salesmen who usually completed their routes and got back to the plant before Hoagland could serve this route and return to the plant. The insubstantiality of Miller's testimony is demonstrated by his own admitted acts as it is recalled that when a notice was posted calling for bids on the S and S route, a class C and a higher paying route than the English and Haymarket routes, Sheehan, the route manager of the group which included the S and S, recommended Hoagland to Miller over the other bidders "as the best man for that route," and Miller, who now many months later at the hearing said Hoagland's work on the Haymarket route was "lousy," proceeded to designate Hoagland for the S and S route "as against the bids of the other drivers," and promote him from a class D to a class C route. Thus at the end of 6½ months of the 8 months he worked for the Company at this time no valid criticism of any kind has been made of Hoagland's work, or even one specific instance of inefficiency, neglect, or failure shown, while on the contrary Miller had moved Hoagland along to one better or more desirable job after another.

As heretofore outlined the last approximately 6 weeks Hoagland worked for the Company at this time was spent on the S and S route with a promise by Miller made at

the time Hoagland took over the route that when Olliges returned Hoagland would be transferred back to the Haymarket route. The last 2 weeks of that period saw the union campaign in the plant launched by Hoagland and largely through his leadership brought to its peak as is shown by the detailed chronological review of events in that connection heretofore set out. The matters presented by Respondent as reflecting unfavorably on Hoagland's handling of this S and S route seem to me, for the most part, to represent a good deal of straining on the part of Sheehan and Miller. Sheehan cites two incidents neither of which loom very impressively in the scale of things.

Sheehan said he went over the entire route with Hoagland on Wednesday and Thursday (March 14 and 15) of the first week Hoagland was on the S and S route. I note that apparently part of the territory included in this route was covered on certain days of the week, and the remaining territory on the other days. Continuing, Sheehan stated that on these trips over the route with Hoagland he instructed him to make the Parkside Inn, "the biggest stop on the route," on Monday, Wednesday, Friday, and Saturday "because" that place "has a good week end business." The following Saturday, March 17, Hoagland made Parkside, but the next Saturday, March 24, he failed to do so, and late in the afternoon of that day Parkside called in and said the Coca Cola man had not been there that day. As it was Saturday and the regular route salemen complete their routes early and are "allowed to go home at 2 o'clock," Hoagland was not at the plant when this call came in so the Company sent "15 or 20 cases of Coca Cola out there," presumably by one of the telephone salesmen, who usually take care of such matters. Sheehan said that on the following Monday he asked Hoagland why he had not made Parkside the previous Saturday, and Hoagland

said he "forgot." Further Sheehan testified that he never again had any complaint of that kind from Parkside. After having apparently said that the route salesman was

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supposed to make this Parkside stop regularly every Saturday, Sheehan said, at another place, "He (the S and S route salesman) worked every other day on that route (that part of the S and S which included the Parkside stop) but **some weeks** he had to make it (Parkside) four days instead of three." (Emphasis supplied.) Hoagland testified that the schedule called for making Parkside, a "drive-in sandwich shop," "most" of whose "business was outside," on Monday, Wednesday, and Friday, "during the winter months," and the same days of the week plus Saturday "during warm weather," that during that part of March and the whole of April that he was on the S and S he made the stop regularly on Monday, Wednesday, and Friday of each week, and in addition went there on Saturday when weather conditions were such as to seem to make a Saturday call advisable, and that such practice was pursuant to Sheehan's instructions to use his "own judgment" about making a Saturday call during that season of the year. Hoagland said that during the time he was on the S and S route on "at least half of the Saturdays" he did not make Parkside as he did not deem, under prevailing weather conditions, that it was necessary to do so. The Saturday to which Sheehan referred was one of the Saturdays he had thought it was not necessary to return to Parkside, as it "had been very cold all that week for that time of year," and "it was cold that Friday" when he "filled up all their empties," and left them fully stocked, "they carried about 60 or 75 cases in stock all the time." It was still cold that Saturday morning, however, as Hoagland recalls, the weather did become "warmer late in the

afternoon." Between 3 and 4 o'clock that afternoon McHugh called Hoagland by telephone at his home and asked him if he had been to Parkside that morning and Hoagland told him he had not and McHugh said he would send "some cases of coca cola out there." When Hoagland made Parkside the following Monday "they had 40 some odd cases . . . plenty of Coca Cola" in stock, and had not "even come close to selling out." The only reaction of Sheehan at the time was a mere inquiry of Hoagland, on the following Monday as to why he did not call at Parkside on Saturday, and it is not said that he so much as reprimanded or warned Hoagland for not doing so. I credit Hoagland's testimony about the matter. It is borne out, to some extent, by the fact that he continued to use his own judgment thereafter about when it was advisable to make that stop on Saturday resulting in not doing so on "at least half of the Saturdays" during the time he was on this route which seems unlikely had Sheehan explicitly warned Hoagland to make that stop every Saturday instead of leaving it to his "own judgment." Further it appears that, as a matter of fact, his judgment on that particular Saturday about the need for returning to Parkside on that day after having fully stocked the place on Friday before was not even faulty.

The second incident related by Sheehan consumed a considerable part of his testimony, and of Hoagland's rebuttal, but boils down to a very inconsequential sort of thing. The Blue Lick road, a country dirt road was one route to Shepherdsville. There was one stop "between the start of that road and Shepherdsville" to which deliveries were made "every two weeks" on Saturday. When Hoagland took over the Shepherdsville and suburban route there was "a bridge out on that road. . . . They were putting in a new one." At the same time the road was

under repair. Because of the bridge and repair work going on the truck could not, at that time, be driven over the road to service the one stop between the beginning of the Blue Lick road and Shepherdsville, and the driver-salesman had to detour around that route to reach Shepherdsville. Sheehan said that when Hoagland took over the S and S route he told Hoagland that "every other week" he (Sheehan) would meet him at some point on Preston Street[43] and put the coca-cola for the one

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stop on the Blue Lick road in his (Sheehan's) coupe and "take it" over that road to this stop. When the first Saturday for delivery to this stop came up,[44] it was handled in that manner. According to Sheehan, 2 weeks later he asked Hoagland what time it would be convenient for Hoagland to again meet him on Preston Street in order to make the delivery in Sheehan's coupe as before, and Hoagland said he "should be there about 12:30." Hoagland said when he arrived that day at the meeting point Sheehan was not there. The only house at that point mentioned in Hoagland's testimony was what had formerly been some kind of a place of business but which had been closed for at least since Hoagland had been on the S and S route, however "the people" who had formerly conducted a business there "still lived in this place . . . they had living quarters in the back." Hoagland said he could not remember what time he arrived there but after waiting there about a half hour for Sheehan he told a 14 or 15 year old boy, who was "playing ball outside," and who he stop-

[43] I do not know, and it is not made clear, where Preston Street is, whether on the outskirts of Louisville or in some town or hamlet somewhere on the route near the beginning of Blue Lick road. References in the testimony seem to indicate that the proposed meeting point was in a country or rural area.

[44] I am not sure, although perhaps immaterial, whether this was the first or second Saturday that Hoagland was on this route.

posed was the "son of the people who owned that place" as he said "he lived there," to tell Sheehan "if he came by" that he (Hoagland) "had gone on down to a small grocery store at the cross roads at the beginning of this Blue Lick Road." Hoagland said he did not know whether there was a telephone at this house on Preston Street as he had "never been in the place." When Hoagland got to this small grocery store at the cross roads, where the Blue Lick road started, he learned that the repair work on that road had been fully completed, and "they had just been over it with a grader that day." Finding the road open for travel of all kinds he "told the people in this grocery" that he expected Sheehan "would come there and to tell him" that he (Hoagland) had gone on "and made the stop." Hoagland then "went on" over the Blue Lick road "and made the stop and didn't have a bit of trouble . . . and from then on went to Shepherdsville on" that road "because it was in good shape." After making the trip over the newly repaired and opened road and taking care of this one stop, Hoagland "called in the office to" McHugh to report before starting on his return to the plant, and at that time told McHugh that he had missed Sheehan and "if he (Sheehan) called in to tell him" that he "made the stop" all right and "to forget about it."

There is some confusion in Sheehan's testimony about the meeting place. At one point he says "it was on Preston Street," later he said he went to "a lunch stand where I was to meet him" and that "there was two ways" that Hoagland "could come . . . Preston Street or around the detour which he was accustomed to coming." This certainly was not the point where Hoagland waited for Sheehan, as the only "place" there was closed, and out of business, and had been since before Hoagland took over the route. Sheehan said he arrived at this lunch stand

"about a quarter of twelve," which was 45 minutes before the time he said he was to meet Hoagland, and ate lunch there, that he "waited until 12:30, and then went in and asked the man (at the lunch stand) again,[45] 'Are you sure the Coca Cola man made you today' and he said, 'Yes he made me earlier.'" Nevertheless Sheehan said he "waited there until 3 o'clock then called the plant on the telephone," and was informed that Hoagland had taken "the truck over the road" and made the stop.

Sheehan's complaints were two: (1) "Overriding my orders" by taking "the truck over the road" which, contrary to the fact, was unfit for travel, and "I imagine if the State would have caught him, or the county whoever had charge, they would probably have fined him, or us." The fact is the road was open and ready for travel of all kinds and was traveled regularly from that day on by Hoagland with the same truck he was driving that day, and no mention whatever is made of any need thereafter of Sheehan using his coupe to service this stop on the Blue Lick road; (2) causing him (Sheehan)

to "sit out in a car in March weather like that in the cold" for "three hours." Sheehan's testimony does suggest some possibility of a misunderstanding as to the meeting place but regardless of that Sheehan leaves some doubt about the accuracy of his time estimates and some wonderment why, if as he says the lunchroom man told him at the latest about 12:30 that Hoagland had made that place "earlier," he waited until 3 o'clock to even inquire of the office whether they had had any report from Hoagland when all the time a telephone was at hand. The only complaint Sheehan made to Hoagland was not that he disobeyed orders by

[45]Indicating he had made the same inquiry previously and received that information.

taking the truck over a road unfit for travel by truck but that it "was a hell of a note to keep a man waiting . . . in the cold" for 3 hours. Apparently Sheehan never arrived at either of the two points at which Hoagland left messages for him.

Miller's and Sheehan's testimony purported to show that while Hoagland was on this S and S route he completed the route earlier than proper service of the route would permit, however their timing was not based upon anything other than some wide estimates here made long after on memory, and which, under the circumstances, I am convinced were not inclined to give Hoagland the benefit of any doubt as to accuracy. When the evidence about the returning time of the 57 route salesmen is considered as a whole it appears that, in fact, many of them driving substantially comparable routes customarily got in around the same time, and some even earlier; than Hoagland. Miller with 57 route salesmen under him claimed to remember that when Hoagland was on this S and S route he "would get in at 1:00 to 1:30 every day," while Sheehan said "he (Hoagland) would get done" at times ranging from 12 to 2 o'clock. As before mentioned it was Hoagland's practice to leave mornings earlier than other route salesmen, in fact at 6:30, and his testimony is, and I am constrained to credit it, that while working the S and S route he "got in as a rule, on week days (meaning other than Saturday) right around 3:30 or 4:00 o'clock." With the exception of the Parkside Inn incident there is no specific evidence, that Hoagland ever at any time failed for any reason to make, or that he skipped, or did not properly service, any stop, and it is my impression that Miller's testimony, implying that Hoagland unduly rushed through; and must necessarily have improperly serviced, all his routes is not corroborated by the facts in evidence and is not factually

founded. Miller said he "spoke" to Hoagland while he was on this route "several times" about getting in early but that "most of" his "contacts" about such matters "were with the route manager," who he "instructs what to tell the route salesmen." in this instance Sheehan. Hoagland declared that none of the supervisors ever criticized him "for any of" his "work while there this last hitch," and, as I have pointed out, the evidence, insofar as it relates to the first 6½ months of the 8 months Hoagland worked there this last time does not disclose that any criticism of any kind was made to Hoagland about his work. Sheehan did not say that Miller ever discussed with him, or mentioned to him, any purported deficiency on the port of Hoagland, or that, at Miller's behest, or on his own initiative, he ever spoke to Hoagland about, or criticized him for, coming in too early, or not spending sufficient time on the route.

Finally Miller advanced the proposition that sales on the S and S route dropped off during March and April. In support of this there was produced, and is Respondent's Exhibit 3, a card purportedly showing case sales by months on this one route during the years 1949, 1950, and 1951, although in the column for "year" no dates at all are shown. This card shows, according to an explanation of it by Miller whereby the 663 listed as cartons in 1950 are said to be in fact cases, that 4,643 cases were sold on this route in March 1950, and 3,708 in March 1951, and, without consideration of any of the numerous factors which would ordinarily affect the sales during a given period of such a product, or taking into consideration that Hoagland was on the route only the last half of that month, the implication that the

difference was somehow, in some way Hoagland's fault is

made. In reference to April, when Hoagland was on this route the full month Respondent turned away from this card and made the following comparisons, the total "overall" company sales, city routes, rural routes, plant sales, all sales of all kinds, for the month of April 1951 "were up in percentage over the month of April 1950, 8.8 percent," but Hoagland's sales were "down from this record three percent." Looking at the card and accepting it as correctly reflecting the sales it purportedly does, there were 4,777 sold on this route in April 1950, and 4,678 in April 1951, a difference of 99 cases. The unreliability of comparisons such as that undertaken, purporting by implication to show Hoagland to have been in someway inefficient, is apparent when made, as here, without any consideration whatever being given to the numerous factors which necessarily would affect demand and sales of this kind of product. There was nothing showing whether weather conditions, a very potent factor, were substantially the same during the two periods, or that there were substantially the same number of outlets, of about the same type and sales volume, along the route, or in short that the situation was substantially the same. Nor were the sales on other rural routes, or any of the 56 other routes, during the same periods compared. At one point speaking of the effect of weather on sales, Sheehan said: "Maybe it would be warm in December and it would be a good month; maybe it would be cold in December and it would be a bad month. It is all according to the weather." As to the weather during March and April 1951 Sheehan could not remember and would only say, "I don't take care of the weather." That, as Hoagland testified March 1951, was "a pretty cold" month throughout, and that the weather was "awful bad," meaning cold or wintery weather, in March and April, is corroborated somewhat by various references appearing

here and there throughout the testimony, as by way of illustration Sheehan's complaint in connection with the Blue Lick road incident that he was left "sitting out" there "in the cold March weather like that." Hoagland said no one ever mentioned to him that the sales on the S and S route were down over the previous year.

As showing just how hard pressed Miller and Sheehan apparently were in finding something unfavorable to attribute to Hoagland is about the last contribution Sheehan made along that line. As the direct examination came to a close Sheehan was asked if there was "anything else wrong with Hoagland's work outside the things he had "mentioned." He answered that Hoagland "wasn't cooperative," whereupon counsel for Respondent asked him what he meant "by that," and Sheehan said that "one time" Hoagland "missed a sales meeting" because "he had to go home early," and that Hoagland did not notify him (Sheehan) but notified one of the other supervisors.

Conclusion about Hoagland's discharge

When the facts about Hoagland's work, the lack of criticism by his supervisors, and his rapid and steady advancement to more desirable and better positions, together with the many side lights shed by the credited evidence as a whole concerning his work, and the insubstantiality of Respondent's claims in respect thereto, are considered, Miller's explanation at the hearing that the sole reason for Hoagland's discharge was his inefficiency is not, in my opinion, factual, and I am unable to credit it, and such consideration also makes understandable Miller's refusal, at the time, to assign any reason for the discharge when Hoagland asked him the reason for that action. It follows that in the setting which emerges from the facts as I have found and believe them to be, and with a background such

as existed at the time, that, upon the preponderance of the credible evidence, as a whole, I am compelled to the conclusion, and find, that Hoagland was, in fact, discharged because of his union activities with the purpose and aim thereby to discourage the organization of the Union in the plant, as alleged in the complaint, and in violation of Section 8 (a) (3) of the Act.

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K. The discharge of Kamenish

Frank Kamenish, at the age of 23, went to work at Respondent's plant April 18, 1950 as a telephone salesman. I have heretofore described the duties, and nature of the job, of a telephone salesman, and in that connection I have also noted that when openings occurred in route salesmen positions thereby operating so as to necessity the designation of a new route salesman a selection was made from available telephone salesmen, presumably the best qualified telephone salesman, from the standpoint of training and demonstrated competency, being moved up to a position as route salesman. After working about 4 months as a telephone salesman the West Central 3 route, in the city of Louisville, "opened", and Sales Manager Miller "gave" Kamenish that route and he took it over, as the regular route salesman "about the middle of August." The route was one of the group under the supervision of Route Manager Carl Bunning, Sr. According to Miller there were at the time "four full time" telephone salesmen.[46] Thus I think it reasonable to assume that Kamenish must have been deemed the best qualified man of the four. Kamenish continued as route salesman on the West Central 3 route

[46] Miller said that there were "probably" as many as 12 telephone salesmen at the time, but that 8 of them were University students who return to school in the fall and only 4 were full time employees.

until his discharge on May 5, 1951, a period of a little more than 8½ months.

I have heretofore set out in detail my findings about Kamenish's union activities which continued unabated until the date of his discharge. He was the first to enlist, or join up, with Hoagland in the union campaign. That was "about the middle of April," and from that time on he was active and busy in promoting the union movement. From the very first he handed out union cards, talked to other driver salesmen about organizing a union in the plant, and urged them to attend a union meeting to be later announced and find out about the union, and when the time and place of that meeting was announced, through Hoagland, he joined with Hoagland and Thomas Brooks in notifying the employees of the date and place of the first union meeting. He attended and participated in both union meetings held prior to his discharge at which times Saier gave him additional supplies of union authorization cards which he continued to hand out, and up to the time Hoagland was fired he met and conferred with Hoagland "quite often" about the union campaign and plans to forward it. Around April 26 or 27, Bunning his route manager, came out on the route and quizzed Kamenish about his union relationship, at which time Kamenish admitted that he had attended the union meeting of April 25, but denied that he had signed a union card, and it was very close after the second union meeting of April 28, and the date of Hoagland's discharge, that Miller told Mialback, in effect, that management knew and was being informed about what was going on in the way of union activities and, as illustrating the preciseness of that knowledge, that they even knew that Kamenish arrived at one of the union meetings "right after" Mialback did. The findings made show that the supervisory staff almost from the beginning knew about the

union campaign, and in the days immediately following they acquired a pretty comprehensive knowledge of what was going on among the employees relating to the formation of a union in the plant, and who was doing what in that connection, until by, and even well before, May 5, the date of Kamenish's discharge, one week to the day after Hoagland's discharge because of his union activities, I am convinced that management had learned and knew about Kamenish's activities in behalf of a union in the plant, and that he was one of the leaders in that movement.

Saturday, May 5, was Derby Day in Louisville. On that day "traffic is pretty thick in Louisville" especially "downtown" and certain other sections of the city, which are covered by several different routes, including

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Kamenish's route. Part of his route was along one section of Broadway and ran "right there by the 16th Street (railroad) station," and another part covered a section of Chestnut Street, which is a "one way street going into downtown." Trucks "were not allowed downtown too long" on that day. It is the custom, "the usual habit among the drivers," on the city routes, which if not formally authorized by the Company has been recognized and acquiesced in by it, to heavily stock most of their dealers on Friday before the Derby Saturday, and make the rest on the morning of that day thus enabling them to get their trucks off the streets and to get in earlier than on a normal Saturday. Even on a normal Saturday it was the practice to come in earlier than during the other days of the week and all drivers were "allowed to go home at 2 o'clock" on Saturday. In accordance with the custom Kamenish, as did other route salesmen having routes in the city of Louisville, in anticipation of this Derby Day, heavily and sufficiently stocked most of the dealers on his route on

Friday so that it would not be necessary to make deliveries to them on Derby Saturday, and thereby was able to supply the few remaining dealers off the more heavily traveled streets and get back to the plant well before noon of that day. It was about 10:30 that morning when Kamenish reported in; and found that at least one other route salesman, Jack Starkey, had preceded him. Starkey told Kamenish that he (Starkey) got in "about 9 o'clock," and Kamenish recalled that "about 20 minutes" after he (Kamenish) got in two other city route salesman, James Lueke and Carl Bunning, Jr., son of Kamenish's route manager, Carl Bunning, Sr., came in. Carl Bunning, Jr. did not testify, but Lueke said he "got in about 11:00 or 11:30" that Derby Day morning, and recalled that at that time Kamenish and "four or five other drivers" were already in, and "if others" had come in earlier "they probably had already gone home."

Sometime before noon that day Kamenish "was down by the time clock getting ready to go home" when his route supervisor, Carl Bunning, Sr., came to him and told him that Miller wanted to see him. Kamenish went immediately to Miller's office. I quote what Kamenish said occurred:

> I went into his office and said, 'you want to see me Will,' and he said, 'Yes, Frank we are going to terminate your employment as of right now.' and I said, 'What's the reason, and he says, 'I don't care to discuss it,' and I said, 'Okay.' He said 'Here is your slip, go down and get paid.' So I went down and got paid, and left.

Kamenish further said that immediately after being thus summarily fired he met Route Salesman Carl Bunning, Jr. and Jim Lueke; and that he told them, "I just got fired" and that "I was coming back Monday to see Mr. Schmidt

and find out the reason." As before stated Carl Bunning, Jr., son of Kamenish's route manager, was not called as a witness, as I assume he would have been had this incident not occurred as Kamenish related. Lueke substantially corroborating Kamenish said, that he met Kamenish "sometime around 11:00 or 11:30 o'clock" when he (Lueke) "came up to cash out," and that Kamenish at that time told him that he (Kamenish) and "just left the office and had got canned, ... I asked him why and he said he didn't know;" and "I went up and cashed out and I don't know where he went." I take these purported statements of Kamenish, the timing and subject matter considered, as part of the res gestae of the event to which they relate, and applying the generally recognized tests of credibility I have no hesitancy in crediting fully the testimony of Kamenish and Lueke about this incident and in finding that immediately upon leaving Miller's office Kamenish told Lueke he had just been "fired" but did not know why or the reason for his discharge, and I further find that at that time, or about the same time, Kamenish also told Lueke and Bunning, Jr., one or the other or both, in substance, as he testified, that "he was coming back Monday to see Mr. Schmidt, and find out the reason" for his discharge.

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However, before leaving the plant Kamenish discovered that a $6.00 commission, to which he was entitled, on a "cooler" which he had sold had not been included in his "pay" so he "went back" to Miller's office, and asked Miller "about that" and Miller said, "That's right you have that coming to you," and he (Miller) called the cashier and told him to "give Kamenish an extra $6.00." Kamenish said Route Manager Sheehan (not Kamenish's route manager) was in Miller's office this "second time" when he returned

to claim the cooler commission. Sheehan, called as a witness by Respondent, did not either affirm or deny this, however. Miller said Kamenish was in his office "just once that morning," the time he (Kamenish) was terminated. I credit Kamenish's testimony that he returned to Miller's office that morning and that Miller ordered the correction in the amount due him as Kamenish said occurred.

The sum total of Miller's affirmative testimony on direct examination about what was said, and what occurred in the termination of Kamenish is brief and is found in 8, mostly leading, questions propounded by counsel for Respondent with Miller's answers thereto and represents his version of that occurrence, as follows:

> Q. Why did you call Mr. Kamenish into your office on May 5?
>
> A. I heard that he got in early, too early, for Derby Day.
>
> Q. Did you discuss these various shortcomings of his with him?
>
> A. Yes, sir.
>
> Q. Did you ask him about getting in early?
>
> A. Yes, sir.
>
> Q. Did you attempt to warn him again?
>
> A. Yes, sir.
>
> Q. What if anything did he do?
>
> A. Blew up.
>
> Q. What do you mean?
>
> A. He said, "if you don't like my work, I will quit."
>
> Q. And what did you say?
>
> A. I said, "That suits me, let's get your money."
>
> Q. How many times was he in your office that morning?
>
> A. I think it was just once.

Miller then said that he did not "tell him (Kamenish) that morning before he said he was going to quit that" he (Miller) "was going to fire him."

In answer to a question by the Trial Examiner, Miller said that he "didn't call" Kamenish in that morning "with any intention of discharging him" and "had no intention to discharge him, he got mad and quit.' Continuing his answers to questions of the Trial Examiner, Miller said that he called Kamenish into his office, on that occasion, because "I wanted to see why he was in off his route so early, and while I had him in there I went over a

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few other things he was deficient in . . . I got on him particularly for getting in so damn early on Derby Day because there was no necessity to be off his route by 10:00 or 10.30 on Derby Day. . . . We talked about other things; his lack of interest in Company sales meetings, his lack of merchandising on his route" and that he was "still wearing at sometime or another" a baseball cap instead of a coca-cola cap, and "then he blew up.'

Miller admitted, on cross-examination, that "we had some drivers in areas where the Derby Day traffic traveled who got through as early as 9 o'clock" on the morning of Derby Day, but he did not know "who was in" that day "before" Kamenish. In that connection he further stated that part of Kamenish's route was along the "north side of Broadway.' Miller's evasiveness when asked, on cross-examination, about Derby Day travel on Broadway, and whether or not that was one of the main thoroughfares of the city and one of the more heavily traveled streets on Derby Day is revealing when coupled with his failure, and that of any witness, to deny Kamenish's testimony, while in fact to a marked extent confirming it, that a considerable part of Kamenish's route was in an area where there was

heavy Derby Day traffic and that customarily the route salesmen on routes in such "areas," by stocking dealers along the heavily traveled streets on Friday before, "got through" early, some as early as 9 o'clock, on Derby Day morning. The facts about Kamenish's route and the prevalent Derby Day practice in that respect being as they are I am so dubious about Miller's testimony that his purpose or motive in calling Kamenish into his office was merely to reprimand him for coming in off his route too early that morning that I find myself unable to credit it. None of the "some of the other drivers," Miller spoke of, who "came in early on Derby Day . . . some as early as 9:00 o'clock" were called in, and no occasion for singling Kamenish out appears.[47]

In view of the findings I have made that Miller's purpose in calling Kamenish into his office was not because Kamenish had gotten in earlier than was usual on a normal Saturday, and that immediately upon leaving Miller's office Kamenish told Lueke and Bunning, Jr. that he had just been fired but did not know why, and that he was coming back on Monday to see Schmidt and try to find out the reason for his discharge, and the weight of circumstances in evidence tending to support these findings, together with my judgment of the credibility to be accorded the witnesses based on my personal observation of them on the stand as well as a consideration of their testimony as whole on all matters, it is my opinion and further finding that Miller called Kamenish into his office that morning for the sole purpose of summarily discharging him, and that he did so in substanitally the manner related by Kamenish, refusing,

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[47]It was at no time claimed, or so much as intimated, that Kamenish failed to stock in advance any dealer on his route sufficiently to carry him evor the Derby Day weekend, or that it became necessary to send an additional supply to any such dealer during that period.

as had been the case with Hoagland one week to the day before, to assign or disclose the reason for the discharge.

Kamenish testified that on the Monday following Derby Day (May 7) he went back to the plant to see Schmidt but "he wasn't in his office" and he could not find him in the plant, and that he then went to Miller's office where and when the following occurred:

> I asked him, (Miller) 'I think I have a right to know why I was fired,' and he said, 'Well, its just one of those things.' I said, 'How about a recommendation.' He said, "You tell your employer to call me, and I will give you a recommendation.'
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>
> I said, 'What kind will I get,' and he said, 'So far as I know it will be good because I have nothing against you personally, and your work has been satisfactory. Its just something that came up in a hurry, and something had to be done about it. That's all I can tell you. If you want to know anything more you will have to see Mr. Schmidt. I will tell you what I can do though, Frank, I can change your termination slip from fired to quit but if I do that you will have to stand behind me.' I said, 'Well, I think that will look better on my record because I never have been fired from a job before, and I have always given notice when I was going to quit,' so he went on and changed it. I saw him erasing something and marking something; what he marked I don't know.

Kamenish said on cross-examination that at that time Miller told him that if he ((Miller) changed his termination slip he (Kamenish) would not be "eligible for unemployment insurance" and that he told Miller he knew that but "thought it would look better on my record that way," and also that

he "agreed" with Miller that "it would be better if my termination slip showed I quit and was not fired" from the "standpoint of getting another job."

Miller did not specifically or generally deny making any of the statements on that occasion attributed to him by Kamenish, or that the conversation and his action was as Kamenish related it. I assume it was deemed that his testimony about what happened on the previous Saturday, when he said Kamenish quit, in effect operated as a sort of a general denial. He was asked by Respondent's counsel whether he recalled hearing Kamenish say, on Saturday (Derby Day), "Put it down I quit," and answered, "I don't remember that," which answer of course did not serve to deny anything that Kamenish had stated about the conversation at Miller's office the following Monday. There is no doubt Kamenish and Miller did have a conversation that Monday, but the only reference to it found in Miller's testimony is in two questions and answers in his direct examination as follows:

> Q. When did you have a conversation with him about the compensation insurance?
>
> A. The following Monday.
>
> Q. And what did he say at that time?
>
> A. He asked me about compensation and I said 'you are not entitled to it,' because he quit.

Although Kamenish testified during the presentation of the General Counsel's case that on Monday Miller "erased something" on his termination "slip" and then marked "something" on it, that "slip" was not produced, nor for that matter any personnel record relating to Kamenish's termination.

I am constrained, under the state of the evidence and in view of the findings heretofore made, to credit Kamenish's

testimony about this Monday morning incident as being substantially accurate. I feel that he was able to and did give at least the general effect if not the literal language of what was said, and that was that Miller again refused to tell him why he had been fired, but told him that his work had been satisfactory, and that his discharge was "just one of those things," brought about by "something that came up in a hurry, and something had to be done about it," which was all he (Miler) was in a position to tell him, and if he (Kamenish) wanted to "know anything more" he would have to see Schmidt. I credit too Kamenish's testimony that the proposal to change the termination record from fired to quit originated with and came from Miller, and that that was the first time the matter of Kamenish quitting was mentioned and came into the course of events.

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After his discharge Kamenish "didn't do anything for a few weeks, and then took a two weeks cruise with the Navy." Upon completion of the Navy cruise he found employment with a beer distributing company, and left that company to take employment at the Oertel Brewing Company, where he was still working at the time of the hearing. It is not said what length of time the "few weeks" he was unemployed immediately after his discharge covered, but it must have been during that period that Kamenish made application for unemployment compensation whereupon the issue of whether he had voluntarily quit his employment with Respondent or had been discharged was raised, the Company alleging that Kamenish had "voluntarily quit work" and was therefore disqualified to receive unemployment compensation. A hearing was had and an award in favor of Kamenish made.

Although Miller positively and unequivocally testified, and reiterated, that when he called Kamenish into his office

Derby Day morning he "had no intention of firing him," and that he did not discharge him but that Kamenish "blew up and quit," and although firmly adhering throughout to that position, Respondent advances the proposal that "even assuming, for the purpose of argument only that" it "did discharge Kamenish" such discharge "was for cause," that is, Respondent says positively it did not discharge Kamenish but if it did discharge him it must have been for cause. Since at no time, and nowhere, does Respondent admit that it discharged Kamenish, but on the contrary continues firmly to deny it did so, how can it now be heard to say maybe it did discharge him for cause? It contributes nothing to the determination of this matter "for the purpose of argument only" to hypothesize a case, when here is a clear issue of fact whether Respondent discharged Kamenish, as the General Counsel alleges in the complaint, or whether Kamenish voluntarily quit his employment, as Respondent affirms. On that issue, I believe the great preponderance of the credible evidence supports Kamenish's testimony that he was summarly discharged in the manner and under the circumstances related by him, and I have so found. However, there was a mass of testimony on the part of Respondent purporting to show, and in rebuttal by the General Counsel, that during the nearly 13 months Kamenish worked there various deficiencies in connection with his work and attitude were manifested. This line of testimony on the part of Respondent culminated in the testimony of Miller who was the last witness called by Respondent. After Miller had summed up and testified about these purported deficiencies on the part of Kamenish he was asked by the Trial Examiner and answered as follows:

> Q. Now you didn't call him in with any intention of discharging him?

A. No, sir.

Q. And despite all these things that were so unsatisfactory you still didn't intend to discharge him?

A. No, I had no intention to discharge him.

I shall touch briefly on the alleged deficiencies on the part of Kamenish listed by Miller and Bunning, Sr., and in doing so I observe here that a review of the evidence concerning same shows, as was noted in the case of Hoagland, the testimony of Respondent's supervisors to be a labored effort to produce something unfavorable to Kamenish, with over emphasis on events tending to magnify them out of all proportion with their importance, so that when all is summed up and objectively evaluated it seems clear enough that Miller did not discharge Kamenish because of these things, or any of them. It was claimed that (1) Kamenish "quite often" failed to wear some part or another of the regulation work uniform; (2) was off of work on two different days and went to the race track; (3) that he

parked the Company truck improperly and got at least one traffic ticket for improper parking. The Company never paid any tickets for him, or other driver-salesmen, and apparently never received any kind of notice in that connection; (4) failed one time to make a stop at a super market; (5) was sometimes tardy in getting to the plant mornings; (6) was at fault in the Coogle incident for which he was reprimanded. Of these in order.

When Kamenish started to work there in April 1950 he obtained the regulation trousers and shirt, but did not get a regulation jacket or cap. Sometimes he wore what was described as a baseball cap. A number of other route salesmen also wore a baseball cap. Kamenish named six, including Bunning, Jr., son of Route Manager Bunning, Sr., and

there were others whose names he could not recall. The next day after the Company posted a notice on the bulletin board that drivers must not wear baseball caps either Miller or Route Manager Bunning told Kamenish he would have to get a regulation cap and jacket whereupon Kamenish went to see a "Miss Day, the girl who takes care of the clothing at the plant." She did not have either a regulation jacket or cap in stock that would fit, Kamenish, and told him she would notify him when she got his "size in." Later Miller "caught" Kamenish wearing a baseball cap and sent Bunning to see Kamenish about it whereupon Kamenish went again to see Miss Day. In the meantime she had received a regulation cap in Kamenish's size, but had failed to notify him. Kamenish bought the cap. "It was warm then" and he "did not need the jacket" at that time. That places the episode in the spring or early summer of 1950, at least 10 months before he was discharged. He later, on approach of cooler weather, purchased a regulation jacket.

On two different days "during the Derby meeting of the spring of 1950," Miller said the time was "immediately after I hired him," Kamenish "laid off" to attend to some "personal business" as was permitted "as long as you called in and told them" in time for the office "to make arrangements for somebody else to take out your route and as long as you didn't put them in the hole," and Kamenish did timely so notify the office. It is not said that any inconveinence resulted by reason of Kamenish laying off on these two days. On both occasions Miller arriving early in the afternoon at Churchill Downs saw Kamenish attending the races. Kamenish, who had attended to personal business and gone in the afternoon to the races, said no complaint was ever made to him about the matter, and the first he ever heard that somehow it was a ground of complaint or criticism against him was when it was brought into the unemploy-

ment compensation hearing. The trips to the races were made approximately 11 to 12 months before he was discharged.

The traffic ticket complaint was coupled with improper parking. Miller said he saw Kamenish "frequently improperly parked on the wrong side of the street closest to the outlet," and that he knew that Kamenish got "at least one" traffic ticket for improper parking. The improper parking, of the kind Miller mentioned, seems to have been rather common practice among the city route salesmen, and Miller admitted that he had seen "other drivers parking improperly" in the same manner, and that he knew that others got tickets, but that the Company did not pay any such tickets.

It is not clear but as best I can gather a new super market opened at 18th and Magazine Streets in Louisville which was, as Miller put it, a "border line stop" between Lueke's route and Kamenish's route, but Miller said there "wasn't any question" that "it was Kamenish's stop," and that Kamenish "either deliberately or otherwise failed to make it," but that when Kamenish was "told about it, he then started" making that stop regularly, and apparently that was all there was to that. The time of this incident is not given.

The complaint about Kamenish being tardy in arriving mornings at the plant seems to have little, if any, real substance. Miller's generalization that Kamenish was "habitually tardy coming to work" is not supported by any time cards or records, and is so thoroughly refuted by circumstances that I am unable to make such a finding. Four other route salesmen lived "in the same neighborhood" in which Kamenish's home was located. Kamenish regularly rode to work in the automobile of one or another of these

fellow drivers, sometimes Kamenish and two or three or all of the others traveling in the same car. Two of these route salesmen were due to leave on their routes at 7 a.m. The drivers having "the largest routes usually" got to the plant before "and would leave around 7:00." Kamenish was on a class D route, as were the other two neighboring drivers (either class C or D) with whom he rode to work. The drivers on class C and D routes went out at varying times shortly after 7 a.m. Kamenish pointed out that his arrival in the morning was dependent largely upon which of his fellow driver or drivers he rode to work with, but even so he usually got there from 5 to 10 minutes before seven, and the latest "would be five minutes after" seven, except upon a rare occasion when weather conditions, such as heavy snow, cause dsome delay, and that if and when he was, if ever, so late as to be considered tardy then by the same token the other driver or drivers with whom he rode to work that day were also tardy yet he never heard of any of them being charged with tardiness, and that "nobody" ever said anything to him "about" or charged him with "coming in late." On the other hand Miller said he "remonstrated with" Kamenish about coming in late, and had Bunning "do the same thing." Miller did not mention having remonstrated with any of these other drivers with whom Kamenish rode to work who must have been, if Kamenish was late, also at the same time late, nor did Bunning specifically coroborate Miller about having him talk to Kamenish about coming in late. In fact, Bunning never did say definitely that he talked to Kamenish about it. At one point in casting about to name anything he talked to Kamenish about, in connection with his work, he said that he "probably had to talk to" him "about coming in late, and things of that sort."

A very considerable portion of the testimony of Route Manager Bunning, as well as that of Kamenish related to

the Coogle incident. Coogle ran a place of business handling coca-cola. Coogle's is near the northeast corner of 10th and Broadway. Kamenish undertook to make that stop on a Saturday morning following "the big snow." The date of "the big snow" of 1951, never was definitely fixed. Respondent's counsel stated that his notes showed it was in February. Bunning said it was "sometime towards the beginning of the year." I would conclude "the big snow" was the last part of January or early February, and, therefore, that this incident occurred approximately 3 months before Kamenish was discharged. There had been an exceptionally heavy snowfall. Snow plows had cleared travel lanes on the downtown streets, but in doing so had moved the snow back alongside the curbs where, as Bunning stated, "it was banked pretty high," and, as Kamenish put it, "pilled" to a height of 3 or 4 feet. In front of some business places along Broadway an opening or "path" had been shoveled through these snow banks along the curb to the streets, but that was not the case at and near Coogle's place. When Kamenish arrived at the Coogle stop he "got" his "truck in a little bit too close to where all the snow was piled," and the "wheels got stuck." Realizing he had gotten in too close, Kamenish tried to maneuver the truck out of the snowbank but was unable to free it. With the high snowbank, and no opening along there, the only way Kamenish could deliver the cases of coca-cola to the Coogle store from the point at which the truck became stuck was to carry and lift one case at a time and climb over the "icy snow banks" with it. He could not use the hand truck. After spinning the wheels to no avail it seems Kamenish went into Coogle's place and telephoned the company office about his predicament, and was told they would send a truck to pull his truck out.

Apparently it is claimed that while Kamenish was in the Coogle store some sort of remarks were exchanged between Coogle and Kamenish, however, what, if anything, was said never was developed. Kamenish returned to his truck and tried again to pull out of the snowbank but "the more" he tried "the deeper" the truck became imbedded. He then tried "shoving pieces of cardboard underneath the back wheels hoping" the wheels would take hold and he could pull out before the tow-truck arrived but still of no avail. According to Miller he "got a telephone call from Mr. Coogle" who said, Kamenish's truck was "parked out in front" of his store, and that Kamenish was in his store "getting warm," and had "refused to bring in the coca cola." Bunning was dispatched to the scene. In the meantime a truck had been sent to pull Kamenish's truck out. Bunning said when he arrived he found Kamenish sitting in the truck. Bunning first went into Coogle's store. When he came out the tow-truck, had arrived and "they were hooking the chain" on Kamenish's truck and "then they pulled it out," and when they "finally" got the Kamenish truck "out into the clear" it was "all the way across 10th street" and "five or six doors down" on Broadway west of 10th Street. This put Kamenish past Gordon's near the northwest corner of 10th and Broadway, and 3 or 4 other stops, which he would normally have made after making Coogle's. He could not back up without backing his truck across 10th Street nor could he make a U turn on Broadway to go back to these stops, so he "went down to 11th and caught the stops on 11th and made 12th," his intention being to come back "in on 10th street and park alongside Gordon's" and from there "make Gordon's, Coogle's" and the other stops "on the other side of Gordon's," which he had missed when his truck had been

pulled away from Coogle's and across 10th Street and down Broadway past a point from which he could conveniently reach those stops. Bunning said he "caught" Kamenish while he (Kamenish) was working "on 12th street," and told him" to go on and make these other stops" and then return to Coogle's.

That which follows is the best I can make out of the mass of testimony concerning this incident about what next happened. Bunning's testimony is itself somewhat conflicting or at the least confusing, in some respects, about what and when it occurred and what was said, as is also that of Kamenish. Upon returning to a point near Gordon's, Kamenish parked on 10th Street, and, with Bunning's assistance, moved the cases of coca-cola to Coogle's by hand truck along "a pretty large path" through the snow made by "people" walking "back and forth between the street intersection there." Further, it seems that, at some point, Bunning had accused Kamenish of having "cussed out" Coogle, so Kamenish said, knowing he had not done that, he asked Coogle, while making the delivery, if he (Coogle) had made such a report, and thereupon Coogle "justified my statement that I didn't say that," whatever it was he was reputed to have said. Coogle did not testify, and Bunning, who was present at the time of this conversation between Kamenish and Coogle, did not deny either that such a conversation occurred or Kamenish's summary of it as stated. Upon returning to the plant Miller reprimanded Kamenish about the way the matter had been handled, and told Kamenish "he wasn't going to let" him "take" his "route out on Monday," which meant he "wouldn't make any commissions that day," but "after hearing" Kamenish's "explanation" Miller "changed his mind," and that "was the only thing ever said about it."

Conclusion, and finding, as to Kamenish's discharge.

Kamenish said that such criticism as was made about the Coogle incident is the only time his work was ever criticized by any supervisor, and it will be recalled that during the conversation in Miller's office on Monday, after his discharge on the preceding Saturday, when Kamenish inquired as to what kind of recommendation Miller would be willing to give him, Miller stated that Kamenish's work had been "satisfactory," and that his discharge had been due to "something that had come up in a hurry, and something had to be done about it," that that was all he (Miller) could tell him about it, and if he

wanted "to know anything more" he would "have to see" Schmidt. Reviewing the detailed statement of the evidence relating to Kamenish, and the findings thereon, which I have made, it seems clear enough that the claimed deficiencies in Kamenish's work had no part in, nor anything to do with, his discharge, and I so find. Further, in view of all the circumstances and the credited evidence, I am convinced, and find, that, in violation of Section 8 (a) (3) of the Act, Kamenish was discharged because of his union activities, as one move in Respondent's effort to discourage and block the formation of a union in its plant.

L. The discharge of Thomas Brooks

Thomas Brooks went to work for the Company in October 1942, and worked there continuously thereafter to the date of his discharge on Saturday, May 12, 1951, one week to the day after the discharge of Kamenish for union activity, and two weeks to the day after Hoagland had been discharged for the same reason. Brooks worked in the basement on a soaker machine; the nature of that operation

has heretofore been described. The basement operation is part of the production department, of which Ferst is superintendent, and was, at all material times herein, carried on by "around 45" workers, all colored, under the immediate supervision of Sargeant, the basement foreman, who was white. In addition to the 45 or more colored workers in the basement there were "eight colored boys" working on the first floor also in production, stacking cases and loading trucks, making a total of, at the least 53 colored workers in the plant. As has been set out, at the very beginning of the union campaign, about mid-April, Hoagland enlisted Thomas Brooks as an associate in that campaign, and as Kamenish was enlisted and served as Hoagland's lieutenant or assistant in promoting and waging the union campaign principally among the route salesmen, Thomas Brooks served in that capacity among the colored workers. Hoagland first supplied Brooks with union authorization cards, and later Brooks received such supplies direct from Saier. Brooks assiduously promoted the union cause among the colored workers, presenting them with, and soliciting them to sign, authorization cards. Up to the time of the second union meeting Brooks returned the signed cards he had obtained to Hoagland. To the time of his discharge, on May 12, Brooks "got about 40 people to sign cards . . . they were all colored fellows." It will be recalled that at the second union meeting on April 28, Brooks was chosen by the colored employees as their representative and liason with the Union. I have pointed out that Schmidt heard about the union movement in the plant somewhere between the 15th and the 20th of April, and I have also related Ferst's claims and the naive conclusions he claimed to have made about seeing the colored workers talking in groups around that time, Thomas Brooks being "in a lot of these groups," and how a few

days before April 25, Ferst and Schmidt thinking they could get some information about the union movement among the basement workers from the nearly blind colored worker Davis, because the Company had befriended him, called him into Schmidt's office and there interrogated him. Then came the early before work company meeting for production employees the morning of April 26 with the union issue the real purpose of the meeting. On the afternoon of that day Sargeant, the basement foreman, asked McCoy, a colored basement worker, if he had signed a union card, and when McCoy was evasive in his answer Sargeant warned him, "You might lose your job over it." It was somewhere between the 25th and the 28th of April, that Ferst first telling Brooks he "trusted" him appealed to Brooks to tell him (Ferst) the "truth" about what he (Brooks) had heard or knew about the Union, and when Brooks disclaimed any knowledge Ferst directed Brooks to let him know what he found out about it, at the same time saying the Company would not "stand" for a union in the plant. On May 4, Ferst told Carnie Brooks, Thomas' brother, that he was "surprised in you Brooks boys" and not to "be a fool, you are not going to get anything out of this union," and shortly after that and but a few days before Thomas was discharged on May 12, Ferst told Thomas Brooks that he

(Ferst) knew Thomas was "mixed up in this business down here," referring to the union movement among the basement workers, and that he (Ferst) was considering taking his (Brooks') overtime job away from him and that in fact he was considering dispensing with his services altogether, the plain and sole possible implication being, because of his union activities. Thus I come to May 12, and Brooks' discharge. Brooks' union activities had been

prominent and effective and when all the circumstances found in the evidence as a whole relating to this phase of the case are considered, it seems certain, as heretofore noted, that management by this time was pretty well informed, and had kept and was being kept informed, about what was going on in connection with the union campaign, and who the leaders were. The review I have made of my findings on the evidence bearing on Thomas Brooks' union activities and the field in which he so effectively labored in behalf of the Union leaves no room for doubt in my mind that by May 12 management had learned and knew about the leadership role Brooks had been playing in promoting the Union among the colored workers.

I think anything like an objective appraisal of Respondent's claims about the things that were wrong with Thomas Brooks, all of which, it is said, first appeared about January or February of 1951, after more than 8 years of apparently satisfactory service on the part of Brooks, when viewed in the light of all the testimony relating thereto, and in the background of his discharge, must leave the impression, which I have, that Ferst, particularly, and Sargeant, the basement foreman, upon whose testimony such claims rest, were pretty hard pressed indeed in an effort to magnify little into much.

Sargeant, the basement foreman and Thomas Brooks' immediate foreman, observed nothing out of the way about Brooks' conduct on the Saturday Brooks was discharged by Ferst, at about noon, the production department usually quit work at noon on Saturdays, nor did Sargeant even know about the discharge until that afternoon when Ferst told him that he (Sargeant) "would have to put someone in his (Brooks') place, that he was gone," however when, on direct examination, Sargeant, as a witness for Respondent, was asked if he knew "the reason" for Brooks' dis-

charge he listed the following specific acts of misconduct on the part of Brooks: (1) "He would go away from his machine a whole lot," during working hours; (2) "he would go into the rest room about 20 or 30 minutes before time"; (3) "he was warned about smoking," (4) and that Brooks "acted sullen whenever" he (Sargeant) asked him if he wanted to work overtime.

Leaving the soaker machine during working hours

The operation of a soaking machine required the services of two men and at the times material here Thomas Brooks and William Trice worked together on one of the soakers. While the men on the soakers were supposed to have a relief period of 10 to 15 minutes twice a day at which times a relief man was supposed to take over from one and then the other, there was little regularity about the relief, and oftimes no relief man was available, or again he would appear, for the first time that day, at the beginning of an operator's lunch period, as the soaker operation continued without shut down during lunch periods, thus merging the rest period and lunch period. It became and was a practice common to all the soaking machine operators for an operator to leave the machine at times momentarily in the care of his fellow operator, for maybe 3 to 5 minutes, to get a drink of water, buy a coca-cola, or go to the locker room where the toilets were located. True if an operator were away from his machine too long "it would crowd the one" operator "to keep the feeding up," and if such absence continued beyond that point the one operator "would have to shut off the machine." It is not mentioned that in the 8½ years that Thomas Brooks

worked there he ever absented himself from his machine

for such a length of time as to make it necessary for his fellow operator to shut the machine down. On direct examination Sargeant testified that in "January and February" 1951, Brooks "began leaving the machine." He said he "wouldn't know" how long Brooks "would be gone" at such times. It is, however, certain it could not have been at most but a few minutes as it is not claimed that any such absence ever resulted in the shutting down of Brooks' machine. Sargeant, continuing on direct examination, said that at such times he would "trace him" (Brooks) and would find him "in different places, in the locker room sometimes, and around upstairs, roaming around," and that "on those occasions" he found Brooks "smoking" in violation of the no smoking rule. I suppose it was intended to leave an implication that in some respect not developed that there was something new and different involving some serious breach, about Brooks, after more than 8 years of service, in January and February leaving his machine for what could have been at most but a few minutes, as was not at all uncommon for all the men working on soaking machines to do, however, the force of this testimony on direct examination, if any it has, dwindled somewhat when in response to questions by the Trial Examiner, Sargeant undertook to say that he did not "think" Brooks ever did that before "the first of the year" (1951), and when asked how many times since the first of the year he had found Brooks away from his machine answered, "I will say two times . . . . I found him on a couple of occasions," and that these "two times" were "in January and February," three or four months before his discharge. When all the evidence about this purported delinquency on the part of Brooks is considered it dissolves as a factor which likely could have had any bearing on his discharge.

The claim that Brooks went into the locker room too long before quitting time

Apparently whatever is the basis for this claim by Respondent occurred prior to and not later than the first part of March, at least two months before Brooks was discharged.

The quitting time, "punch out time," for production workers was 5 o'clock. According to Ferst and Sargeant, "they (the soaker machine men) quit putting bottles in" the soaker machines "a quarter after four" at which time the men working on those machines "go to cleaning up around the machine," and "washing up the machine," which "takes about a half hour . . . something like that," and if they "hurried up" the cleaning job could be done "in about twenty minutes." Sargeant said, "they could get through the cleaning up job before ten minutes of five." However, allowing for the full thirty minutes for cleaning up, as estimated by Ferst, brings the time to 4:45. I again interpose to note that it became a practice of the men working on the soaker machines when they had completed the cleaning up job to go to the locker room and shower and dress before the 5 o'clock quitting time. It seems that such practice had existed over a period of years. Continuing the testimony of Ferst and Sargeant about this, they said these men were allowed 10 minutes on Company time "for taking showers," and that it was permissible for them to go to the locker room 10 minutes before 5 o'clock if by that time they had completed the cleaning up, however, Sargeant claimed that although the men completed the cleaning up job more than 10 minutes before 5, as oftimes they could and did, say, 4:45, which conforms to Ferst's own estimate, they were nevertheless not supposed to go to the locker room until 10 minutes before 5 o'clock. Apparently there was no real reason so far as any work

remaining to be done is concerned, Sargeant's vague allusion to the contrary notwithstanding, for them to wait the few intervening minutes until that exact moment to start to the locker room. The evidence shows, and I find, that it was a practice or custom on the part of all the men working on the soaker machines to go on to the

locker room when they had completed the cleaning up job whether 10 minutes or slightly more than that before 5 o'clock quitting time. The only anything like specific indication as to how long this practice had been going on is found in the testimony of Carnie Brooks who, when asked if he ever heard any supervisor "complain about" the basement workers "taking showers at a quarter to five," said "a couple of years ago we ran into it a lot. Carl Ferst used to give us sand about it,' but that the "last" complaint of that kind that he could remember "was at least two years ago." Thomas Brooks freely admitted that "occasionally" he got through the clean up job and went to the locker room "around . . . fifteen minutes before five." Not one specific instance or time is so much as mentioned when Thomas Brooks, or any other soaker machine operator, in any way failed or neglected to do and complete the clean up job in a proper and satisfactory manner before he or they went to the locker room. This but illustrates how hard pressed Respondent was to find some complaint against Brooks to bring to his hearing that he is singled out as being reprehensible in this respect.

Apparently it is sought to imply that somehow and at sometime in the past Thomas Brooks was responsible for the start of the practice on the part of the soaker machine men of going to the locker room earlier than 10 minutes of 5 although they had completed the clean up job. How he was responsible is not explained. This suggestion is in-

jected only by remotest innuendo. It was "around March" that "Thomas Brooks' brother, Lavell, who for some time had been doing an overtime job, upstairs after regular work hours, "servicing the machines for the next day," decided, "since he was going to school" to quit his overtime job, whereupon he and Thomas sought out Ferst and requested him to let Thomas have the overtime work which Lavell had been doing. Ferst granted their request and put Thomas on the overtime job. Asked about this Ferst said he was approached by Lavell and Thomas about Thomas taking Lavell's place on this upstairs overtime job, that Thomas at that time "asked" him "for the overtime" job, and that he "sent him (Thomas) up there on account of Red (Lavell) leaving, going to school," that is, that the Brooks brothers initiated the matter, made the proposal, and Ferst granted their request. However, in bolstering the claim about Brooks sometimes going to the locker room a few minutes prior to the permissible 10 minutes before 5 o'clock time, and in testifying about it, Ferst said that "some of the other employees started going in" the locker room too soon, as if that were something new prompted by Thomas Brooks, "and in order to try to break it up I took Tom upstairs" on an overtime job "where we could watch him." It was explained that Brooks' upstairs overtime job commenced at 4:45 p.m. which allowed time for him to complete the cleaning up job after his soaker machine in the basement had been shut down at 4:15 p.m. It is strange that if such really were the controlling purpose in giving Brooks the upstairs overtime job, Ferst never even mentioned it to Sargeant. According to Sargeant, Ferst did not discuss with him the assignment of Thomas Brooks to the upstairs overtime job, and never told him his reason for doing so or why he did so. Ferst said that "it looked like" the sending of Thomas Brooks upstairs at 4:45 "broke up"

the employees "going into the locker room early . . . pretty good at the time . . . but of course they would try to sneak in there if you didn't watch them, I mean fifteen minutes before time (instead of waiting until ten minutes before) but any employees will do that I guess." Sargeant, who was ignorant of the purportedly curative action taken by Ferst, apparently observed no appreciable difference about the basement workers going to the locker room a little more than 10 minutes before 5 p.m., after Brooks started working from 4:45 upstairs. In fact Sargeant admitted that that happened "all the time . . . before March (when Brooks took the overtime job upstairs) and after March."

It must have been early in March, or in the first part of March, that Thomas Brooks took over this upstairs, overtime job, 2 months or more before his discharge, and both Ferst and Sargeant admit that that ended any

purported complaint about Brooks going to the locker room a few minutes prior to the purportedly permissible time of 10 minutes before 5 p.m., if indeed any real or meritorious complaint on that score ever existed. Both admit that all and whatever they claim occurred in that connection was prior to the time in March that Brooks took on the overtime job. It is not claimed that his services on the overtime job were not satisfactory and he continued regularly on that job until he was discharged. It is difficult to conceive, how such complaint, even had there been any valid ground therefor, which I do not credit, had anything to do with, or bearing on, his discharge on May 12, nor do I discover that it is directly claimed that it did.

About smoking

While it is my conclusion, in view of the overwhelming preponderance of the evidence showing a general disregard; at least among the basement workers, with the tolerance of the supervisors, of the no-smoking rule, that smoking would not have been invoked as a ground therefor in any bona fide discharge of Brooks, and, as a matter of fact, when Respondent's testimony is analyzed it is not directly claimed that he was discharged for violating that rule, nevertheless I shall review the evidence about smoking.

There is no question that there was a rule prohibiting smoking in the plant, and there is no question, in my mind, that it was not either very strictly observed or enforced, particularity among the basement workers. Ferst and Thomas Brooks said the no-smoking rule had been in effect since about 1944, while Sargeant thought since 1941. "At the stairway," leading to the basement, "which everybody" working "in the basement uses" is "a large sign reading, 'No smoking anywhere in this building.'" While Ferst declared that both the "entire basement" and the "entire first floor" are in the prohibited area, "the white people" were permitted to smoke in the office of McHugh, the dispatcher, and in certain other first floor offices, but no place in the basement or inside the building was set aside where the colored workers could smoke. Ferst explained that the colored basement workers were permitted to "come out of the basement" during a relief period to the loading dock outside the building and smoke there, and that "sometimes when a fellow" is momentarily caught up with his work "nobody won't get after" him if he comes up out of the basement and goes outside on the loading dock and "takes a puff on a cigarette." McCoy, a colored basement worker, said that since the only place the basement workers were permitted to smoke was outside the building it was oftimes

too cold "to go outside and take a smoke," or for other reasons even on the relief periods there was not time or it was highly inconvenient to go up out of the basement and outside the building to smoke, he and the other basement workers "usually smoke" (present tense used) in the basement locker or dressing room, and that it was a "common practice" for the basement workers "to smoke in the locker room if no one was around." When asked as to how many times he had smoked in the locker room, McCoy answered: "Too numerous to count," and said that both Ferst and Sargeant had seen him "smoking in the locker room," and at such times Ferst would tell him to "stop smoking," and at times had warned him that "sometime Bud (Schmidt) is going to walk in on you instead of me."

The testimony of the basement workers, who appeared as witnesses, was to the effect that over the years Ferst and Sargeant frequently came into the locker room and found basement workers smoking there, and well knew that the basement workers commonly smoked in there, and that on the occasions they "caught" basement workers smoking in the locker room the most they said or did about it was to tell the smokers to "Watch those cigarettes," "Put that cigarette out," or "Don't let Bud (Schmidt) catch you smoking those cigarettes," and that Ferst "never pushed the issue." Thomas Brooks said that throughout the whole of the more than 8 years he worked there it was

"usual" for the basement workers to smoke "in the locker room." McCoy said that there was smoking outside the locker room while men were working at their machines. Carnie Brooks, brother of Thomas, said he smoked "in the dressing (locker) room and sometimes" while working at his machine, and "we all smoked in the dressing room." The foregoing testimony of McCoy and Thomas and Carnie

Brooks about smoking stands for the most part undenied and is in so many respects corroborated by the testimony of Sargeant and even that of Ferst that I credit it as depicting the situation in reference to smoking in the basement which had undoubtedly continued over a period of many years. Sargeant stated that "a lot of them smoked" in the basement and that he frequently "caught" basement workers "smoking down there" both in the locker room and "at their machines," that he had reprimanded them for it but he had never sent any of them "to see" Ferst or Schmidt. Apparently Sargeant never himself undertook, nor did he recommend, any disciplinary action against any of his basement workers for smoking. Ferst said he "would see smoke" in the basement locker room but "they" would "dump them" and "be gone . . . when I got down there," that from time to time he saw "a few" cigarette "butts" on the locker room floor, and "I would caution the boys every time I went in there" saying, "Somebody has been smoking again, and if we catch you, we are going to have to fire you," but "I never caught nobody (smoking) in there," then in the next breath he said Thomas Brooks "is the only one I would catch." This convenient elasticity and inconsistency is characteristic of Ferst's testimony throughout. As I have indicated, I credit the testimony of these rank-and-file basement workers that both Ferst and Sargeant from time to time saw or "caught" basement workers smoking both in and outside the locker room, and at such times passed the matter off with remarks of the type aforestated.

No one was ever discharged for smoking and the only disciplinary action of any kind ever taken was a 1-day lay off of Carnie Brooks, the time is not stated, when Schmidt himself for the second time caught Carnie smoking in the basement and sent him home for that one day. This

incident and the aftermath is illustrative of the attitude generally of the supervisors about smoking by the basement workers. Carnie Brooks testified in substances as follows, one "evening about getting off time" he and another basement worker were smoking in the locker room when Schmidt came in there and caught them; Schmidt made an inquiry about a locker key, but did not say anything to them about smoking; later Schmidt "caught" him and his "helper on the machine" smoking in the basement one Friday morning "right before working time," and told them to "put on" their "clothes and go home"; he (Carnie Brooks) changed from his work to the street clothes, and, taking his "card" with him, went to Ferst's office to see if he was "fired or not"; Schmidt and Ferst were together in Ferst's office, and they informed him that he was not fired but was being laid off for that day only and could "come back to work" the next day, "Saturday." Presumably the same treatment was accorded the helper although no further mention of him appears in the testimony or whether he was even actually laid off. Carnie reported for work as usual the next morning, and during that day, the very next day after the lay off, Sargeant "saw" him smoking and told him to "put that cigarette out," at the same time remarking that "Bud (Schmidt) was kicking about it" (smoking in the basement), however, nothing was ever said to Carnie about that incident by either Schmidt or Ferst; and after the time he was laid off the one day for smoking Ferst caught him smoking "about six or seven times more," but all that Ferst said or did about it, at any of these times, was to "just" tell him "to put the cigarette out," and he never heard "from Bud Schmidt about it." The time of the lay off is not fixed. Sargeant testified that after Carnie Brooks was laid off the one day for smoking, he caught "Carney Brooks smok-

ing again," and that he told Carnie, "You know what happened, and it's liable to cost you something if you continue." Sargeant said he then reported to Ferst that he had "caught him (Carnie Brooks) smoking again," but so far as he knew Ferst did not do "anything about it."

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Sargeant did not say how soon after the 1-day lay off of Carnie this occurred but the context indicates it was the first occurrence of that kind after the lay off, and I credit Carnie Brooks' testimony that that occurred on the very next after. Ferst did not deny, except insofar as his statement that he never "caught nobody" smoking in the basement locker room may serve as a denial, Carnie Brooks' testimony that after the lay off Ferst caught him smoking on "six or seven" occasions and did no more about it than caution him "to put that cigarette out," and in the light of all the circumstances tending to show the situation about smoking in the basement, and the unrealibility of Ferst's testimony generally, I credit Carnie Brooks' testimony about the matter.

Sargeant's claims that a certain times Brooks "acted sullen"

The fourth reason for the discharge of Thomas Brooks, assigned by Sargeant, that Brooks "acted sullen whenever" he (Sargeant) "would ask him (Brooks) whether he didn't want to work a little longer," that is work overtime, seems, when the slight and vague testimony there is about it is evaluated in the light of realities, pretty inconsequential, and by no means a conceivable ground of a bona fide discharge, and apart from the lack of substance, is the further reason that whatever and all that Sargeant based this claim on admittedly occurred before Brooks early in March took over the regular overtime job upstairs, and that was the

end of that complaint against Brooks, if complaint of that nature ever really existed, and it is not explained how nearly 2 months later it had, or could have had, any part whatever in his discharge.

The claim that Brooks was sullen toward Foreman Sargeant was first brought into the testimony in this way, counsel for Respondent asked Sargeant, on direct examination, "How was Brooks' attitude so far as obeying instructions," to which Sargeant answered, "Kind of sullen, sarcastic." Nowhere does Sargeant say that Brooks ever refused or failed, in connection with his work, to properly perform any task assigned to him by Sargeant or to obey any order of that kind given, nor did Sargeant give so much as one specific instance of this so-called sullen and sarcastic attitude, and made no explanation at this point of what was meant by "sullen" or "sarcastic", however, it was here that Sargeant said this "sullen" attitude "had been noticeable since about the first of the year." The only near clarification of what was meant is found in the cross-examination of Sargeant when he was asked what he was talking to Brooks about "at these times" he claimed Brooks was "sullen." Sargeant answered, "When I would find out how many men were needed for overtime work, I would go up and say to him (Brooks) 'Do you want to work tonight,' and he would say 'No.' That was his attitude, and it continued, and I wouldn't ask him any more." Thus, as in his statement of the reasons why Brooks was discharged, he here associated the so-called sulleness with a refusal to work overtime. So far as appears here, or anywhere in this record, the sulleness consisted of the way Brooks said "No" when Sargeant asked him if he wanted to work overtime. Apparently the working overtime was optional, and Sargeant does not say that he even requested or urged Brooks to work overtime,

merely asked him if he wanted to do so. On the other hand Brooks said that the only times he ever refused overtime work was when he had "sickness at home . . . and had to get home as soon as I could and help take care of the kids," and that those times were "over a year before" he was discharged, and that he "welcomed" overtime work. It has already been related how when his brother, Lavell, decided to quit his regular overtime job Thomas went along when Lavell went to tell Ferst he was quitting and simultaneously asked for and received the overtime job and worked at it regularly until he was discharged. Sargeant did not say how many times or how often, or when prior to the time early in March that Thomas Brooks commenced regularly working overtime that Brooks turned down an opportunity to work overtime, but Ferst said he would "guess"

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it was only a "few times" Both Ferst and Sargeant repeatedly admitted that the complaint, if any there were, about not working overtime entirely came to an end when Brooks took the regular overtime job upstairs." Sargeant said that before Brooks "moved upstairs" on the evening overtime job, early in March, he told Ferst about Brooks being sullen, and "that it all happened before March." On redirect examination Sargeant was asked, by Respondent's counsel, "Did he (Brooks) at any time refuse to talk with you about matters when you tried to talk with him." In answer, Sargeant said "Yes he would" and that "on those occasions" Brooks "wouldn't talk to" him "about things." What matters or what things Brooks wouldn't talk about, or when or where he would not talk with Sargeant, are not mentioned, and the only thing anywhere specified, has been noted, that Sargeant claimed when he would ask Brooks if he wanted to work overtime all Brooks

would say was "No" without elaboration. Brooks said that he never refused to talk to Sargeant, and that he "listened" to anything Sargeant had to say "regardless of what it was."

It seems more than strange that after more than 8 years of continuous service that this so-called sulleness on the part of Brooks in connection with a refusal to work overtime should develop about the first of the year and continue for about 2 months, or until he got the regular overtime job. In my opinion about the only end this claim serves is to accentuate the flimsiness and weakness of Respondent's explanations about why Brooks might have been discharged.

It will be remembered that Sargeant, Brooks' immediate foreman, did not either discharge Brooks or recommend that he be discharged, and that such complaints as he claimed he had or made about Brooks were prior to the time Brooks took over the regular overtime job upstairs, early in March, and two months or more before Brooks was discharged, and further that Sargeant was not consulted about and did not even know until after that action had been taken by Ferst that Brooks was to be or had been discharged.

Ferst discharges Brooks

I come now to the actual discharge of Brooks on Saturday, May 12, one week and two weeks to the day respectively after Kamenish and Hoagland, the two other leaders in the union movement had been discharged because of their union activities. Ferst discharged Brooks, and I first review his version of the matter. It will be remembered that Ferst was the superintendent of the production department and had "about 80" employees throughout the plant working under him, with Sargeant as foreman of the

basement workers. Quitting time on Saturday is at 12 o'clock noon. "Sometimes" bottling is done on Saturday mornings at which time the soaker machines in the basement are in operation. Ferst said that on Saturday mornings that bottling was not done, "we have the crew in there and they wash up the machines . . . they do a thorough job of cleaning . . . that is all they do on Saturday mornings when we do not bottle," and that on this Saturday that Brooks was discharged, "I am not sure whether we were bottling that day or not," or "whether" Brooks' machine "was running" that morning "or whether it was just a clean up job." Brooks who had testified as a witness for the General Counsel was not asked about this.

As Ferst recounted the happenings of that morning, as relates to Brooks, he claims to have watched Brooks pretty closely from 10 o'clock until noon. Ferst said, he went to the basement "around 10:00 o'clock" but "didn't see" Brooks "on the machine" and that he "went looking for him"; he went first into the locker room but "didn't find" Brooks "there" and "then went upstairs and found" Brooks there "talking to some of the boys on the first floor"; he asked Brooks what he was doing "up here" and "why don't you get on your machine"; Brooks "never said nothing" but "in a sulky,

sneery way, went back to the basement." Ferst could not recall who Brooks was talking with. At one point Ferst said that 15 minutes later he looked "through from the first floor down to the basement" to see if Brooks was at his machine, and Brooks was not there whereupon he "went down to the basement" and found Brooks standing in the locker room smoking and told Brooks "he had been cautioned about that on numerous occasions, and we certainly wasn't going to put with that no more." At another point

Ferst said he did not know what time it was when he found Brooks smoking in the locker room but imagined it "was about 10:30 or so." Ferst said he did not "think there was anybody else in the locker room at the time," however, he added that he "might have caught him" (Brooks' smoking "twice that morning; I don't know." Continuing his account, Ferst said, "Then about 11:30 o'clock or 11:30, I found him upstairs again away from his machine, and I sent him back down." Ferst had no idea how long Brooks had been upstairs either of the times he claimed he found him there. "After that" Ferst said, "I went downstairs to see if he (Brooks) was finishing his work there, and talked to him." If Ferst's purpose on this purported trip to the basement was to see if Brooks had finished or properly completed his work, as apparently he claimed, I assume he found that Brooks had done so as nothing to the contrary is said. Ferst stated that it was at this time he told Brooks, "before you go home, I wish you would step in my office."

I quote now Ferst's testimony about what happened when Brooks came at the noon quitting time to his office:

> He came in the office and I told him, 'Tom it looks like you are dissatisfied with everything around here[18] and Mr. Sargeant has been complaining on you and telling me about you for sometime, that whenever he says anything to you, you just give him a sneery look and walk away from him and don't do what he wants you to do.' I said, 'I think maybe the best thing is for you to quit. If you don't quit, we will have to terminate your services anyway, because we are not going to put up with this kind of thing. You are dis-

[18]The union campaign with which Brooks had been prominently and influentially identified, particularly as the leader of the colored workers, had by now been going on approximately one month.

rupting the whole thing in the basement, and we just can't put up with you.' He (Brooks) said, 'Well give me my money.' That's all. I went and got his money.

It will be noted that Ferst, according to his own testimony, did not tell Brooks, and does not now claim, that he was discharging, or that he did discharge, him because, as Ferst claimed, he had two times that morning caught Brooks for a very few minutes at most, so far as any measure of time appears, away from his machine, which is not shown to have been in operation at the time, and caught him once standing in the locker room smoking, rather the only cause mentioned or claimed was that Sargeant had complained that whenever he said anything to Brooks that Brooks would "just give him a sneery look and walk away from him" and not do what Sargeant wanted him to do, and apparently that was the "kind of thing" to which Ferst purportedly related his statement that, "we are not going to put up with this kind of thing, you are disrupting the whole thing in the basement, and we just can't put up with you." However, when I recall what Brooks had accomplished in enlisting practically the whole group of colored basement workers in the Union, and his leadership of them in the union campaign, the query springs to mind whether in fact that was what Ferst referred to and meant in accusing Brooks of "disrupting

the whole thing in the basement" because of which "we just can't put up with you." That was the most recent activity of Brooks and had been going on for nearly a month continuing unabated to this very time, and the circumstances heretofore related indicate it was rented by Ferst. This is further buttressed by Sargeant's testimony to the effect that such complaints as he made along the

line here mentioned, as well as any other complaints he claims to have had or to have made, if any he did in fact make, about Brook's work or attitude, and the grounds therefor which he assigned, were all made, and occurred, more than 2 months before this date and according to Sargeant, and ever other testimony of Ferst, no purported complaints against Brooks had been made, nor had the purported grounds therefor existed, for two months or more before the date of Brooks' discharge. Anyway it is clear enough, as first stated, that Ferst did not even claim that one ground for the discharge of Brooks was that he purportedly caught Brooks away from his machine on two occasions that morning, and that such really occurred is dubious. Brooks as a witness for the General Counsel was not asked about that when cross-examined on his version of the events of the morning of his discharge, nor was he recalled after Ferst had testified as a witness for Respondent. However, in relating what occurred and his contacts with Ferst that day Brooks mentioned only that Ferst came into the locker room just as he (Brooks) put a cigarette in his mouth, and that later at Ferst's request he went to Ferst's office. William Trice, the man who, at the times material here, worked on the soaking machine with Brooks, said that it was his recollection that "we was cleaning up" the Saturday morning Brooks was discharged, however, that they may have "bottled" awhile but "shut down" the machines and quit bottling "at 10 o'clock" and spent the remainder of the morning "cleaning up." Trice said he did not remember Brooks being away from his place of work that morning, except one time when Brooks went to the rest room and was gone about 5 minutes. Sargeant, Brooks' immediate foreman who was present in the basement did not see Brooks ayay from his machine the day he was discharged and apparently knew nothing

about such purported absence or absences, and did not report, or have any occasion to report, Brooks to Ferst that day for anything. In fact Sargeant was not consulted about Brooks' discharge and did not even know he had been discharged until "sometime" in the evening" of the day he was discharged when Ferst "told me I would have to put someone in his (Brooks') place, that he was gone," and that that did not "call" his "attention to anything Thomas Brooks had done that day," nor did he relate Brooks' discharge, and apparently Ferst did not so advise him, to anything Brooks had, or had not, done that day, or which had occurred that day.

The facts last above related tend to lend credence to Brooks' own version of his discharge and the events of that morning preceding it. As related by Brooks, he went into the locker room "to get some money to get some coke out of the machine"; there were other basement workers in the locker room at the time; he was at his locker and "had just put a cigarette" in his mouth but did not remember whether he had yet lighted it when Ferst came in the locker room; Ferst said, "Watch those cigarettes," and he discarded his cigarette; the other basement workers "ran out as soon as" Ferst "came in the door"; Ferst "walked over to the urinal" and then "came back" and told him (Brooks) that before he left "to come up to his (Ferst's) office, we wanted to see me."

Brooks' account of what occurred and was said when he went, at the noon quitting time, to Ferst's office follows:

> He told me, 'I have to tell you something that I hate to tell you.' I said, 'What is it?' He said, 'Well I am going ask you to quit your job, I want you to resign.' I said, 'I can't do that. I need my job. I don't have any other one to go to . . . I can't quit my job.'

So he said, 'Well, I will have

to ask you to do it, they keep on riding me.' . . . I asked him, 'Is there anything wrong with my work?' He said, 'No, I haven't had any complaints about you,' and 'If you go any place and look for a job, I will recommend you.' I asked him why was it that he was firing me. He said, 'Nothing, I just have to let you go. They keep pushing me and I have to get rid of you. I may have to get rid of a whole lot of them.'[49] So I sat there and we looked at each other for awhile, and he would keep saying the same thing over, so I said, 'Well at this rate, I guess, I may as well go on home.'

I consider Brooks a credible witness, based in part upon my observation of, and impression about, him on the witness stand, and too upon the consistency of much of his testimony on material matters, when his testimony is taken as a whole, with, and its corroboration by, facts and circumstances either admitted by Respondent's own supervisors, or established by the testimony of other witnesses, and also by the application of the recognized tests of credibility to his testimony, and in view of this, and my already expressed dubiousness about Ferst's testimony generally, I credit Brooks' testimony about his discharge as being, in his crude way of telling it, substantially accurate. Thus accepting substantially Brooks' version, it will be noted that, as did Miller in discharging Kamenish, Ferst here refused to assign any specific reason, grounds, or cause for discharging Brooks, merely saying that "they" were pushing him "to let" Brooks "go," and he had "to get rid" of Brooks, at the same time admitting that he had

[49]This was understood by Brooks to refer to the colored basement workers.

no complaints about Brooks' work and even offering to give Brooks a favorable recommendation.

Conclusion about the discharge of Thomas Brooks

Considering the background here of a series of unfair labor practices resorted to by Respondent in an effort to obstruct and defeat the formation of a union in its plant, and Brooks' active and influential part in the union campaign, about which, by the date of his discharge, or well before, Respondent knew, together with the summary discharge of Brooks with no bona fide cause therefor at the time assigned, or at the hearing shown, it follows, as the whole trend of the evidence about, or bearing upon, Brooks' employment, union activities, and discharge, and the innumerable circumstances emerging along the way, indicate, that the only reasonable conclusion I can make is that he was discharged because of his union activities, in violation of Section 8 (a) (3) of the Act.

M. Respondent's contention concerning compliance with Section 9 (f), (g), and (h) of the Act

Citing N. L. R. B. v. Wiltse, d/b/a Ann Arbor Press, (C. A. 6) 188 F. 2d 917 (85 NLRB 58), certionari denied, 342 U. S. 859, I denied prior to the hearing, by written order, Respondent's prehearing motion to dismiss the complaint because same did not allege that at the times the charges were filed and the complaint issued, the three labor organizations named in the complaint, and the officers of each, had complied with Section 9 (f), (g), and (h) of the Act. Thereafter by its answer and various oral motions, and offers of proof, during the hearing Respondent sought to litigate the question of compliance by the said labor organizations, and the officers thereof, with subsections (f), (g) and (h) of Section 9 of the Act, and to

have the complaint dismissed because the General Counsel had not alleged, and offered proof of such compliance. It having been preliminarily determined, by and through the administrative processes and procedures of the Board that each of said labor organizations, and the officers thereof, had duly and timely complied with the requirements of said subsections, I held, in conformity with the numerous and uniform decisions of the Board, that such compliance was a matter for administrative determination by the Board, and was not litigable by the parties in this proceeding. Lion Oil Company, 76 NLRB 565; Pauls Valley Milling Company, 82 NLRB 1266; The Red Rock Company, 84 NLRB 521; N. L. R. B. v. Red Rock Co., 187 F. 2d 76 (C. A. 5), cert. denied, 341 U. S. 950; Mine Safety Appliances Company, 85 NLRB 290; Tanners Association of Fulton County, 87 NLRB 214; Comfort Spring Corporation, 90 NLRB 173; Intertown Corporation, 90 NLRB 1145. The Act does not, as a condition to the exercise of the Board's jurisdiction, require pleading and proof by the General Counsel that the labor organization filing the charge, and national or international labor organizations of which it is an affiliate or a constituent unit, and the officers of all such labor organizations, have complied with the requirements of Section 9 (f), (g), and (h) of the Act. Wiltse, d/d/a Ann Arbor Press, supra; Law and Son v. N. L. R. B., 192 F. 2d 236 (C. A. 19); N. L. R. B. v. Greensboro Coca Cola Bottling Company, 180 F. 2d 840 (C. A. 4); N. L. R. B. v. Vulcan Forging Company, 188 F. 2d 927 (C. A. 6); N. L. R. B. v. I. F. Sales Company, 188 F. 2d 931 (C. A. 6); McComb Mfg. Company, 95 NLRB 596; Edwards Bros., Inc., 95 NLRB 1451.

In making its administrative determination of compliance the Board found, necessarily so, that all individuals

holding positions designated as offices by the constitution and bylaws of the respective labor organizations herein, to which Section 9 (f), (g), and (h) applied, including the CIO, had duly complied with the requirements of subsection (h) by timely filing the non-Communist affidavit required by that subsection. Respondent alleged in its answer, and the General Counsel, in effect, admitted that at all material times one W. B. Taylor bore the title and was known as "regional director of the CIO for the Kentucky region." W. B. Taylor was not listed as an officer of, or as holding any position designated or recognized as an office by the constitution or bylaws of the CIO, or the constitution and bylaws of the Brewery Workers Local Union or the Brewery Workers International, and had not filed the non-Communist affidavit to which subsection (h) relates. Respondent offered to show the functions performed by the said Taylor on behalf of the CIO as bearing upon the question of whether he was in fact or effect an officer of the CIO within the purview of said subsection (h). I again held that the determination of whether the officers of the CIO had complied with the requirements of that subsection was an administrative matter, and that it did not come within the province of this hearing to take evidence pro and con about the functions some individual, who was not designated or recognized by either its constitution or bylaws as an officer of a labor organization, performed, or type of work he did, on behalf of, or in the interest of, that organization and make a finding based thereon as to whether he should be considered, although not recognized by the organization itself as such, an officer of such organization subject to the requirements of subsection (h). Sunbeam Corporation, 89 NLRB 469.

Further, "Under Section 102.14 (b) (3) of the National Labor Relations Board Rules and Regulations, only an

individual holding a position identified as an 'office' by a labor organization's constitution and bylaws is an 'officer' who needs to comply with the filing requirements unless it can be shown that a labor organization had omitted the designation of a position as an 'office' in order to evade or circumvent the filing requirements of the Act." Aerovox Corporation, 104 NLRB No. 40. No such showing

was made or offered in this case, and the administrative determination that all officers of the labor organizations herein involved have complied with the filing requirements of the Act stands.

Finally, this matter of compliance was disposed of in Case No. 9-RC-1235, 96 NLRB No. 209, which arose upon a representation petition filed by the charging Union herein, where the Respondent Company undertook to raise the same questions about compliance which it has endeavored to inject into this case, including that concerning W. B. Taylor. In its Decision and Direction of Election in that case, issued on November 14, 1951, the Board said: "The fact of compliance" is a matter "for administrative determination" and is "not litigable by the parties. Moreover the Board is administratively satisfied that the Petitioner * * * is in compliance."

N. Respondent's "Proposed Findings of Fact"

Respondent has submitted five proposed findings of fact, All have been disposed of by the findings I have herein before made, and ruled against Respondent, wherefore, each of said proposed findings of fact must be, and hereby is, refused.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III above, occurring in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that Respondent has engaged in the unfair labor practices set forth above, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated, within the meaning of Section 8 (a) (3) of the Act, in regard to the hire and tenure of employment of Delmar Hoagland, Frank Kamenish, and Thomas Brooks, it will, therefore, be recommended that, in order to effectuate the purposes and policies of the Act, Respondent offer each of them immediate and full reinstatement to his former, or a substantially equivalent, position[50] without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered because of the discrimination against him by payment to him of a sum of money equal to the amount he would normally have earned as wages from the date of his discriminatory discharge to the date of Respondent's offer of reinstatement less his net earnings during that period.

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[50] "Former position wherever possible, but if such a position is no longer in existence then to a substantially equivalent position." The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.

Loss of pay shall be computed on the basis of each separate calendar quarter or portion thereof during the period from the discriminatory discharge to the date of a proper offer of reinstatement. The quarterly periods, herein

called quarters, shall begin with the first day of January, April, July, and October. Loss of pay of each of said discriminatees shall be determined by deducting from the sum equal to that which he would normally have earned for each such quarter, or portion thereof, his net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back pay liability for any other quarter. F. W. Woolworth Company, 90 NLRB 289. It will also be recommended that Respondent upon reasonable request, make available to the Board and its agents, for examination and copying, all payroll and other records pertinent to a determination of the amounts of back pay due.

Since Respondent has, in the manner herein found, restrained, coerced, and interfered with its employees in the exercise of their rights under the Act, and has discriminated with regard to the hire and tenure of employment of three of its said employees, and since the attitude of opposition by Respondent to the purposes and policies of the Act, as disclosed by the evidence and said unlawful conduct, is such as to indicate the likelihood of similar and other unfair labor practices being directed against its said employees in the event they should continue, or again seek, to exercise their rights under the Act, the remedy applied should be coextensive with such threat. Therefore, in order to make more effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and

obstructs commerce, and thus effectuate the policies of the Act, I shall recommend that Respondent cease and desist from in any manner infringing upon the rights guaranteed employees in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The operations of Respondent constitute and affect commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Delmar Hoagland, Frank Kamenish, and Thomas Brooks, thereby discouraging membership in a labor organization, Respondent has engaged, and is engaging, in unfair labor practices in violation of Section 8 (a) (3) of the Act.

4. By the aforesaid discrimination, as well as other conduct above specifically set forth and found, Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and has engaged, and is engaging in unfair labor practices in violation of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that Respondent, Coca-Cola Bottling Company of Louisville, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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(a) Discouraging membership in United Brewery and Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, or any other labor organization, by discriminating in any manner against any of its employees in regard to their hire or tenure of employment, or any term or condition of employment;

(b) Interrogating or questioning employees concerning their union activities, connections, or sympathies; threatening employees, or any of them, with the loss of their jobs, or impairment of job security or tenure, because of union activity or membership, or lending assistance in the formation of a union in the plant; attempting to ascertain the position of its employees in reference to the formation of a union in the plant, by causing to be presented to them, and soliciting them to sign, written antiunion statements or declarations; or seeking to induce, or directing, any of its employees to report to it on the union activities of other employees;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Brewery and Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring

membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which I find necessary to effectuate the policies of the Act:

(a) Offer to Delmar Hoagland, Frank Kamenish, and Thomas Brooks, each, immediate and full reinstatement to his former, or a substantially equivalent, position without prejudice to his seniority or other rights and privileges, and make him whole, in the manner set forth in the section above entitled "The remedy," for any loss of pay he may have suffered by reason of Respondent's discrimination against him;

(b) Upon request make available to the Board and its agents, for examination and copying, all payroll and other records necessary to a determination of the amount of back pay due under the terms of these recommendations;

(c) Post in conspicuous places at Respondent's plant and office in Louisville, Kentucky, including all places there where notices to employees are customarily posted, copies of the notice attached hereto as an Appendix. Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by Respondent's representative, be posted by it, as aforesaid, immediately upon receipt thereof, and maintained for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(d) File with the said Regional Director for the Ninth Region, within twenty (20) days from the receipt of this Intermediate Report, a report, in writing, setting forth in detail the steps which Respondent has taken to comply herewith.

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It is further recommended that unless within twenty (20) days from the receipt of this Intermediate Report, Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated at Washington, D. C., this 30 day of June 1953.

(s) Charles L. Ferguson,
Trial Examiner.

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APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effecuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in United Brewery and Soft Drink Workers Local No. 20, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, or any other labor organization, by discriminating in any manner against our employees in regard to their hire or tenure of employment or any term or condition of their employment.

We Will Not interrogate or question our employees concerning their union activities, connections, or sympathies, or threaten any of them with the loss of his job, or impairment of job security or tenure because of

his union activity or membership, or solicit them, or cause them to be solicited, to sign antiunion petitions or declarations, or seek to induce, or direct, them, or any of them, to report to us on the union activities of other employees.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer to Delmar Hoagland, Frank Kamenish, and Thomas Brooks, immediate and full reinstatement to their former, or substantially equivalent, positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to the hire or tenure of employment or any term or condition of employment be-

cause of membership in or activity on behalf of any such labor organization.

Coca-Cola Bottling Company of Louisville, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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DECISION AND ORDER

Case No. 9-CA-418

On June 30, 1953, Trial Examiner Charles L. Ferguson issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and

recommendations of the Trial Examiner,[1] with the following additions and modifications:

1. Before and at the hearing, the Respondent raised as an issue, and sought to litigate, the compliance with Section 9 (h) of the Act by the charging Local (United Brewery and Soft Drink Workers Local 20, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO), by the International Union of which the Local is a constituent and by the Congress of Industrial Organizations. In support of its position,

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the Respondent contended that W. B. Taylor, the CIO Regional Director in Louisville, Kentucky, exercised administrative and executive duties and powers over Local 20 of the Brewery Workers; that Taylor was in fact an officer of the CIO although not listed as such in its Constitution and bylaws; and accordingly, that Taylor was required under Section 9 (h) to file a non-Communist affidavit, which he had not done. Relying on the Board's previously-announced doctrine that a union's compliance may not be litigated in a complaint proceeding, the Trial Examiner rejected various offers of proof made by the Respondents, denied the Respondent's various motions, and otherwise prevented the Respondent from litigating the subject of the CIO's compliance. In its brief to the Board, the Respondent asserts that it desired to show at the hearing that the failure of Taylor to comply with the Act was a circumvention thereof, and that the failure to list Taylor's name as an officer of the CIO, in either the CIO's Constitution or its Bylaws, was an attempt to evade the Act.

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[1] We reject, as lacking in merit the contention made by the Respondent in its brief that the Trial Examiner was biased or prejudiced against it.

The Board has ruled that the compliance status of a union which is required to comply is a matter for administrative determination, and not one to be litigated in complaint[2] or representation[3] proceedings.[4] A recognition of the deed to expedite the hearing of cases and the resolution of issues on their merits was the reason for the adoption, and still is the reason for the retention, of this rule.[5] Although adhering to such rule, the Board has nevertheless permitted, and even encouraged,[6] parties to Board proceedings to bring to the Board's attention matters affecting the compliance status of unions. The Board thus has specifically provided in Section 102.13 (b) (3) of its Rules and Regulations, Series 6, as amended, for an investigation

"where the Board has reasonable cause to believe" the filing requirements of Section 9 (h) of the Act are being purposely evaded, as is now contended by the Respondent. To assist the parties in calling such matters to its attention, the Board has adopted the policy of having its agents release to interested parties, under proper safeguards, names of designated union officers and of persons who have filed the required affidavits.[7] Furthermore, the Board will entertain motions regarding the compliance status of

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[2]Shawnee Milling Co., d/b/a Pauls Valley Milling Co., 82 NLRB 1266, 1267.

[3]Lion Oil Co., 76 NLRB 565, 566.

[4]This is in distinction to the question whether a particular organization is a labor organization and one which is required to comply. N. L. R. B. v. Highland Park Mfg. Co., 341 U. S. 322.

[5]Lion Oil Co., supra; Baldwin Locomotive Works, 76 NLRB 922, 923; C. D. Jennings & Co., 68 NLRB 516, 518.

[6]Sunbeam Corporation, 94 NLRB 844.

[7]Sunbeam Corporation, 94 NLRB 844.

In the present case, the Respondent requested such compliance data and was furnished in writing the names of the officers of the CIO, as well as of the Brewery Workers and its Local 20, together with a statement that Taylor was not listed as an officer.

unions,[8] will consider such information as may be submitted in determining whether a situation warrants further investigation,[9] and has in fact conducted such investigations. If the need therefor is shown, the Board will conduct a hearing in which the issue can be heard and determined. The occasion thus afforded the parties to institute collateral proceedings, and to have compliance matters heard and decided, is real and not illusory for the outcome of such a collateral proceeding may affect the substantive aspects of a pending case.[10]

To summarize, then, although compliance matters may not be litigated in Board representation or complaint proceedings, it has been the Board's practice to permit parties to representation and complaint proceedings to cause to be instituted an administrative investigation of those compliance matters which the Board may properly decide, in collateral proceedings before the Board. We hereby affirm our intention to continue that practice.

Whether and to what extent the Board decisions on compliance are reviewable by the Courts, it is for the Courts, and not this Board, to say.[11]

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Suffice to say that the Board has established a regularized procedure pursuant to which compliance issues can be raised and determined in collateral proceedings; and that,

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[8]Cf. Metropolitan Life Insurance Company, 90 NLRB 935, in which an employer filed an affidavit with its objections to an election, asserting that the actual leaders of the union had not filed non-Communist affidavits.

[9]See Luckenback Steamship Company, Inc., 103 NLRB No. 1; Aerovox Corporation, 104 NLRB No. 40, enf'd Aerovox Corporation v. N. L. R. B., 33 LRRM 2437 (C. A. D. C.) decided January 28, 1954.

[10]E. g., in Sunbeam Corporation, supra, the Board conducted a further administrative investigation of the union's compliance status, Compliance Status of Local No. 1150, UE, 96 NLRB 1029, and thereafter vacated its prior certification and its outstanding order to the employer to bargain with the union, Sunbeam Corporation, 98 NLRB 525.

[11]See N. L. R. B. v. Highland Park Manufacturing Co., 341 U. S. 322.

where non-compliance is established and the resulting determination affects the substantive aspects of cases pending before the Board or the Courts, the Board will take appropriate steps to effectuate the filing provisions of the Act. Furthermore, if parties to pending cases seek Court review of our collateral compliance determinations,[12] and if review is permitted by the Courts, the above-outlined procedure will, we believe, provide a complete and adequate record for review.[13]

As already stated, in this case the Respondent did not attack the union's compliance in a collateral administrative proceeding, but sought to raise the subject at the hearing on the merits. In conformance with the Board's rule set forth above, the Trial Examiner properly refused to hear evidence thereon[14] and properly denied the Respondent's motions. Moreover, had the Respondent proceeded by an appropriate motion to the Board, and had the Respondent established in a collateral proceeding what it had offered to prove at the hearing herein, we are satisfied, and find, that under the Board's present "constitutional" test, such proof would fall short of substantiating the Respondent's contention that Taylor was an officer of the CIO. Under the Board's "constitutional" test, an officer is a person occupying a position identified as an office in a union's

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[12]Cf. N. L. R. B. v. Red Rock Co., 187 F. 2d 76, 77 (C. A. 5).

[13]Board Member Rodgers is of the opinion that these issues are reviewable by the courts in the manner provided for by Sections 10 (e) and (f) of the Act.

[14]American Rubber Products Corp., 106 NLRB No. 10; Comfort Spring Corporation, 90 NLRB 173.

Contrary to the contention of the Respondent, we do not view the decision of the Supreme Court in N. L. R. B. v. Highland Park Manufacturing Co., 341 U. S. 322, as requiring that the determination of compliance issues be made in the proceeding on the merits.

constitution;[15] and it does not appear that Taylor is a person occupying such a position in the current CIO Constitution. Nor does it appear, as the Respondent states in its brief, that the position which Taylor occupies was omitted from the CIO's Constitution in order to evade or circumvent the filing requirements of Section 9 (h).

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An examination of the Constitutions of the CIO for the years 1946 through 1953, inclusive, which covers a period both preceding and following the passage of the Taft-Hartley Act, shows that Taylor's position was never designated as a CIO office.[16] Accordingly, we reaffirm the Board's determination, made in the earlier representation case[17] involving similar issues raised by the Respondent, and now hold that the CIO is in compliance, and that the Respondent's contentions with respect to the matter made in this case lack merit.[18]

2. We adopt the Trial Examiner's finding that Local 20 of the Brewery Workers, CIO, is a labor organization which admits to membership employees of the Respondent. The Respondent contends that Negro employees "will

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[15]Sec. 102.13 (b) (3), National Labor Relations Board Rules and Regulations, Series 6, as amended.

Chairman Farmer and Member Rodgers join in this decision as a proper application of the existing rule but are not to be taken as necessarily agreeing to the Board's current constitutional test as the exclusive basis for determining compliance.

[16]As the CIO does not have a set of Bylaws dealing with this or any other matter, the Respondent's contention that Taylor's position was purposely omitted therefrom lacks merit.

[17]Coca-Cola Bottling Company, 96 NLRB 1425.

[18]We also reject the Respondent's contention that compliance must be alleged and proved. The Board and the Courts have unanimously held to the contrary. N. L. R. B. v. Greensboro Coca Cola Bottling Co., 180 F. 2d 840 (C. A. 4); N. L. R. B. v. Red Rock Co., 187 F. 2d 76 (C. A. 5) cert. denied 341 U. S. 950; N. L. R. B. v. Wiltse, d/b/a Ann Arbor Press, 188 F. 2d 917 (C. A. 6), cert. denied 342 U. S. 859; N. L. R. B. v. Vulcan Forging Co., 188 F. 2d 927 (C. A. 6); N. L. R. B. v. I. F. Cales Co., 188 F. 2d 931 (C. A. 6); Law and Son v. N. L. R. B., 192 F. 2d 236 (C. A. 10); N. L. R. B. v. Service Metal Industries, 201 F. 2d 48 (C. A. 6); and Victor Products Corp. v. N. L. R. B., 208 F. 2d 834 (C. A. D. C.).

never become members of the Union." However, the undisputed evidence is that shortly after the Union began organizing the Negro and white employees at the Respondent Company, some Negroes were "obligated" and "admitted to membership" in the Union. Moreover, there is no showing that the Petitioner will not accord adequate representation to the Negro employees.[19] We therefore find no merit in the Respondent's exception to the finding.

3. The Respondent also excepts to certain factual findings of interrogation based on the conduct of Sales Manager Miller, because he was not listed as one of Respondent's agents alleged to have committed such interrogation in the General Counsel's Statement to Make Complaint More Definite and Certain, which was furnished the Respondent upon order of the Trial Examiner.[20] As evidence of such interrogation by Miller was introduced

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at the hearing without any objection, claim of surprise, or request for postponement being made by the Respondent, and as the issue was fully litigated, we find that the Respondent was not prejudiced by the omission in the General Counsel's Statement.[21] We therefore find no merit in the Respondent's exception.

4. In view of our agreement with the Trial Examiner's findings that, by the conduct detailed in the Intermediate Report, the Respondent violated Section 8 (a) (1) of the Act, we find it unnecessary to rely upon any additional

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[19] Texas and Pacific Motor Transport Company, 77 NLRB 87, 89; Norfolk Southern Bus Corporation, 83 NLRB 115.

[20] Miller was listed in the Statement as being responsible for other 8 (a) (1) violations: i. e. making threats creating impression of surveillance and circulating antiunion petition.

[21] Premier Worsted Mills, 85 NLRB 985, enf'd N. L. R. B. v. Premier Worsted Mills, 183 F. 2d 456 (C. A. 4).

finding that the acts of interrogation, standing alone, are violative of the Act.[22]

5. We also agree with the Trial Examiner that the Respondent discharged employees Hoagland, Kamenish, and Brooks in violation of Section 8 (a) (3) and (1) of the Act.[23]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Coca-Cola Bottling Company of Louisville, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Brewery and Soft Drink Workers Local 20, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO, or any other labor organization,

by discriminating in any manner against any of its employees in regard to their hire or tenure of employment, or any term or condition of employment.

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[22]Member Murdock sees no reason not to rely on the Trial Examiner's findings with respect to interrogation as they appear entirely correct.

[23]The Respondent states in its brief that its counsel "has seen, and examined, written waivers of reinstatement for each of these men," and that Hoagland is a fugitive from justice, has been indicted for armed robbery, and is suspected of implication in four additional armed robberies. As these assertions are outside the record, and as they refer to matters which allegedly occurred after the hearing and which do not affect our determination of unfair labor practices on the part of the Respondent, we find that such matters should more properly be left for determination at the compliance stage, at which time the facts may be orderly developed as evidence, in the event of disagreement on the amount of back pay due and the right of reinstatement. We expressly reserve the right to modify the back pay and reinstatement provisions of our order herein if such action should be required by facts not now in the record or by specific circumstances not now apparent. Crowley's Milk Company, Inc., 88 NLRB 1049, 1052.

(b) Interrogating or questioning employees concerning their union activities, connections, or sympathies; threatening employees, or any of them, with the loss of their job, or impairment of job security or tenure, because of union activity or membership, or lending assistance in the formation of a union in the plant; attempting to ascertain the position of its employees in reference to the formation of a union in the plant, by causing to be presented to them, and soliciting them to sign, written antiunion statements or declarations; or seeking to induce, or directing, any of its employees to report to it on the union activities of other employees;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Brewery and Soft Drink Workers Local 20, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to each of the following—Delmar Hoagland, Frank Kamenish, and Thomas Brooks—immediate and full reinstatement to his former, or a substantially equivalent, position without prejudice to his seniority or other rights and privileges, and make him whole, in the manner set forth in the section of the Intermediate Report entitled "The

Remedy," for any loss of pay he may have suffered by reason of Respondent's discrimination against him;

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(b) Upon request make available to the Board and its agents for examination and copying, all payroll and other records necessary or useful to a determination of the amount of back pay due under the terms of this Order;

(c) Post at Respondent's plant and office in Louisville, Kentucky, copies of the notice attached hereto as an Appendix.[26] Copies of such notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof, and maintained for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., April 23, 1954.

Guy Farmer, Chairman
Abe Murdock, Member
Ivar H. Peterson, Member
Philip R. Rodgers, Member
National Labor Relations Board.

(Seal)

[26] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in United Brewery And Soft Drink Workers Local No. 20, International Union Of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO, or any other labor organization, by discriminating in any manner against our employees in regard to their hire or tenure of employment or any term or condition of their employment.

We Will Not interrogate or question our employees concerning their union activities, connections, or sympathies, or threaten any of them with the loss of his job, or impairment of job security or tenure because of his union activity or membership, or solicit them, or cause them to be solicited, to sign antiunion petitions or declarations, or seek to induce, or direct, them, or any of them, to report to us on the union activities of other employees.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL offer to Delmar Hoagland, Frank Kamenish, and Thomas Brooks, immediate and full reinstatement to their former, or substantially equivalent, positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to the hire or tenure of employment or any term or condition of employment because of membership in or activity on behalf of any such labor organization.

Coca-Cola Bottling Company of Louisville, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

National Labor Relations Board, - - Petitioner,

v.

Coca-Cola Bottling Company of Louisville, Inc., - - - - - - - Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp V, Secs. 141 et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Coca-Cola Bottling Company of Louisville, Inc., its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Coca-Cola Bottling Company of Louisville, Inc. and United Brewery and Soft Drink Workers Local 20, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO, Case No. 9-CA-418."

In support of this petition the Board respectfully shows:

(1) Respondent is a Kentucky corporation engaged in business in the State of Kentucky, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 23, 1954, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

National Labor Relations Board,
By (s) A. Norman Somers,
Assistant General Counsel.

Dated at Washington, D. C.,
this day of

543a In United States Court of Appeals
for the Sixth Circuit

Cause Argued and Submitted—February 10, 1955

Before ALLEN, MARTIN, and MCALLISTER, Circuit Judges

This cause is argued by Samuel M. Singer for petitioner and by A. Singleton Cagle for respondent and is submitted to the court.

In United States Court of Appeals for the Sixth Circuit

Judgment—Filed February 15, 1955

This case came on to be heard upon the record and briefs and oral argument of counsel:

And it appearing that respondent at the hearing herein contended that W. B. Taylor, CIO Regional Director for Kentucky, is an officer of the CIO and is required under Section 9 (h) of the Labor Management Relations Act, 29 U. S. C. § 159 (h) to file a non-Communist affidavit;

And it being conceded that said W. B. Taylor had not filed such an affidavit;

And it appearing that in support of its contention respondent offered to show that said W. B. Taylor is an officer of the CIO; that he exercises administrative and executive powers over United Brewery and Soft Drink Workers Local 20, and exercises a working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region;

545a And it appearing that the Trial Examiner excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceedings, in which action the Trial Examiner was sustained by the Board;

And it appearing that respondent is entitled to judicial review of the legal question whether there has been compliance with Section 9 (h); National Labor Relations Board v. Highland Park Manufacturing Company, 341 U. S. 322, 325, 326;

The case is hereby remanded with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to this court.

547a [Clerk's certificate to foregoing transcript omitted in printing.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 79

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

Order allowing certiorari. Filed October 10, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Harlan took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1955

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FILED
MAY 13 1955
HAROLD B. WILLEY, Clerk

No. — ~~700~~ 77

In the Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 15, 1955, which remanded the case to the Board with instructions to conduct further proceedings.

ORDERS AND OPINIONS BELOW

The order of the court below (Appendix A, *infra*, pp. 1a–2a) is reported at 219 F. 2d 441. No separate opinion accompanied this order. The findings of fact, conclusions of law and order of the Board (R. 392a–537a) are reported at 108 N. L. R. B. No. 81.

JURISDICTION

The order of the court below (Appendix A, *infra*, pp. 1a–2a) was entered on February 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. at 147, 29 U. S. C. 160 (e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly held that the question of whether or not all of the officers of a labor organization have filed the non-Communist affidavits required by Section 9 (h) of the National Labor Relations Act may not be litigated in a Board unfair labor practice proceeding but is a matter for the Board to investigate and determine in separate administrative proceedings.

2. Whether the Board could properly hold that, in the absence of purposeful evasion as provided in its Rules and Regulations, the term "officer" within the meaning of Section 9 (h) is limited exclusively to a person occupying a position identified as an office in a union's constitution.

STATUTE AND RULE INVOLVED

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 29 U. S. C. 159 (h), provides:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of

employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

Section 102.13 (b) of the Board's Rules and Regulations is set out in Appendix B, *infra*, pp. 3a–4a.

STATEMENT

This case arises out of an unfair labor practice proceeding commenced before the National Labor Relations Board on a complaint brought by a union against respondent Coca Cola Bottling Co. of Louisville, Inc. During the proceedings, respondent sought to litigate the question of

whether there had been full union compliance with the non-Communist affidavit requirements of Section 9 (h) of the National Labor Relations Act, as amended. The Board, in finding that respondent had committed certain unfair labor practices, held, *inter alia*, that (a) the compliance status of the union under Section 9 (h) was a matter for determination by the Board in collateral administrative proceedings and not one which should be litigated directly in an unfair labor practice case; and (b) in any event respondent's offer of proof related to a union employee who did not come within the definition of a union "officer", within the meaning of Section 9 (h) of the Act (R. 527a–531a). When the Board requested the Court of Appeals for the Sixth Circuit to enforce its remedial order, that court ordered the case remanded to the Board with directions to reopen the record in the unfair labor practice proceedings, so as to permit respondent to adduce evidence as to the union's Section 9 (h) compliance status (Appendix A, *infra*, pp. 1a–2a).

The detailed facts pertinent to the issues raised in this petition for certiorari may be summarized as follows:

1. *Proceedings before the Board:* On May 17 and October 16, 1951, the United Brewery and Soft Drink Workers Local 20 (the Local), an affiliate of the Congress of Industrial Organizations (the CIO), filed unfair labor practice charges alleging that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act. The Board's General Counsel thereupon issued a com-

plaint based on these charges (R. 5a–7a), it having been theretofore administratively determined that the Local and its affiliated unions, including the CIO, had complied with the non-Communist affidavit requirements of Section 9 (h) of the Act (R. 27a–29a, 516a–517a).

At the hearing on the complaint before a Board trial examiner, respondent sought to show that the CIO was not in compliance with Section 9 (h) of the Act because one W. B. Taylor, CIO regional director for Kentucky and allegedly an officer of the CIO, had not filed a non-Communist affidavit. In support of its position respondent offered to adduce evidence purporting to show that Taylor's duties and functions were such as to make him an officer of the CIO within the meaning of Section 9 (h) (R. 517a, 527a). The trial examiner rejected the offer, holding, in conformity with the uniform decisions of the Board, that the question of compliance was a matter for administrative determination by the Board, and was not litigable by the parties in the unfair labor practice proceeding (R. 517a–518a). On the merits the trial examiner found that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act, as alleged in the complaint (R. 395a–515a, 521a).

2. *The Board's Decision:* The Board upheld both the trial examiner's rulings on the procedural question and his findings on the merits (R. 526a–533a). Reaffirming its rule that "the compliance status of a union which is required

to comply is a matter for administrative determination, and not one to be litigated in complaint or representation proceedings", the Board explained (R. 528a–529a):

> A recognition of the [n]eed to expedite the hearing of cases and the resolution of issues on their merits was the reason for the adoption, and still is the reason for the retention, of this rule. Although adhering to such rule, the Board has nevertheless permitted, and even encouraged, parties to Board proceedings to bring to the Board's attention matters affecting the compliance status of unions. The Board thus has specifically provided in Section 102.13 (b) (3) of its Rules and Regulations, Series 6, as amended, for an investigation "where the Board has reasonable cause to believe" the filing requirements of Section 9 (h) of the Act are being purposely evaded, as is now contended by the Respondent. To assist the parties in calling such matters to its attention, the Board has adopted the policy of having its agents release to interested parties, under proper safeguards, names of designated union officers and of persons who have filed the required affidavits. Furthermore, the Board will entertain motions regarding the compliance status of unions, will consider such information as may be submitted in determining whether a situation warrants further investigation, and has in fact conducted such investigations. If the need therefor is shown, the

> Board will conduct a hearing in which the issue can be heard and determined. The decision thus afforded the parties to institute collateral proceedings, and to have compliance matters heard and decided, is real and not illusory for the outcome of such a collateral proceeding may affect the substantive aspects of a pending case. [Footnotes omitted.]

The Board then pointed out that respondent did not avail itself of the Board's established procedure for determining compliance questions. It noted (R. 530a) that respondent, although apprised of Taylor's failure to file a non-Communist affidavit, did not request a collateral administrative proceeding but, instead, sought to raise the issue in the unfair labor practice case.

The Board further stated (R. 530a–531a) that, even if respondent, in accordance with the Board's practice, had properly raised the compliance question in a separate collateral proceeding, respondent's offer of proof would fall short of establishing that Taylor was an "officer" within the meaning of Section 9 (h) under the test previously adopted by the Board and incorporated in Section 102.13 (b) (3) of its Rules and Regulations (see

---

[1] Prior to the institution of the unfair labor practice hearing, and thereafter again in course of the hearing, respondent requested and obtained compliance information from the Board which, among other things, disclosed that Taylor had not filed a non-Communist affidavit. (R. 528a, fn. 7; 25a–29a).

Appendix B, *infra*, p. 4a). Under this test, the Board treats as an "officer" a person occupying a position identified as an office in the union's constitution, or occupying a position which the union has omitted from the designation of officers in its constitution for the purpose of evading or circumventing the filing requirements of Section 9 (h). Applying this test, the Board found that Taylor was not an "officer" since it did not appear either that Taylor was occupying a position listed as an office in the CIO constitution or that the position which he occupied had been omitted from the constitution in order to evade or circumvent the filing requirements of the Act.

Accordingly, the Board concluded that the CIO was in compliance with the filing requirements of Section 9 (h), and entered an appropriate remedial order (R. 533a–537a).

The CIO's constitution (Article IV, Section 1) lists the following officers: president, executive vice president, secretary-treasurer and eight vice presidents, all elected by a majority vote at its annual convention. Neither the current constitution nor the constitutions prior to the enactment of the Taft-Hartley Act listed the position of regional director as an office. The regional directors are under the supervision of the CIO's organizational department which in turn is directed by the executive vice president (Article V, Section 5, of the CIO's constitution); Hardman & Neufeld, *The House of Labor* (Prentice-Hall, Inc., 1951), p. 113; Report to the CIO by President Walter P. Reuther, 15th Constitutional Convention (1953), p. 28.

Two of the four Board members (Chairman Farmer and Member Rodgers), who participated in the decision in the instant case, joined in the conclusion that the CIO was

3. *Proceedings in the Court of Appeals:* Upon the Board's petition for enforcement of its remedial order, the Sixth Circuit, without passing upon the merits of the Board's unfair labor practice findings, ordered the case remanded to the Board for further proceedings (Appendix A, *infra*, pp. 1a–2a). The court noted in its order that concededly Taylor had not filed a Section 9 (h) affidavit; that respondent had offered to prove that Taylor is "an officer of the CIO" exercising "administrative and executive powers over" the Local and a "working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region"; and that the trial examiner, with the subsequent approval of the Board, had excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceeding. Relying on this Court's decision in *National Labor Rela-*

in compliance with the Act under the Board's "constitutional test", but reserved decision on whether such test is "the exclusive basis for determining compliance" (R. 531a, n. 15). Chairman Farmer and Member Rodgers have since followed and applied the "constitutional test" in other cases without reservation. See *General Shoe Corp.*, 109 N. L. R. B. No. 88 and *Crown Upholstering Co.*, 110 N. L. R. B. No. 49.

[1] In the court below respondent made no suggestion that Taylor's position had been omitted from the CIO's constitution for purposes of evasion; it contended, *inter alia*, that the Board's "constitutional test" was, in the light of the purposes sought to be achieved by Section 9 (h), too narrowly drawn.

tions Board v. *Highland Park Manufacturing Co.*, 341 U. S. 322, the court stated that "respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9 (h)" of the Act. Accordingly, it remanded the case to the Board "with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to [the] court."

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erroneously determined two questions of major importance in the administration of the National Labor Relations Act. Furthermore, that court's holding on the question of the right to litigate compliance status under Section 9 (h) of the Act in a complaint proceeding is in direct conflict with decisions in two other circuits.

Both questions are present, potentially at least, in every unfair labor practice or representation proceeding that comes before the Board. If the Board should be required to follow the decision below in all such proceedings, determination of the merits in complaint and representation matters will become subject to great delay, and the Board's ability to perform its statutory functions under the Act will be substantially impaired.

1. In rejecting the Board's settled rule that the compliance status of a union under Section 9 (h) of the Act is a matter for the Board's administrative determination and not one to be litigated in an unfair labor practice or representation proceeding, the holding below is in square conflict with the decision of the Seventh Circuit in *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, and with the decision of the Fifth Circuit in *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, certiorari denied, 348 U. S. 873.

In *American Rubber*, as here, the employer offered to prove in the course of the unfair labor practice hearing before the trial examiner that an individual who had not filed a non-Communist affidavit was "an officer or at least a *de facto* officer of the union" involved in that case. The court agreed with the Board that the issue was not triable in a hearing on the merits, stating (214 F. 2d at 55): "This question of fact was a matter for the Board's own administrative determination and was not a matter which petitioner was entitled to raise and litigate in an unfair labor practice proceeding." Similarly, in *Vulcan Furniture* the court sustained the examiner's rejection of a similar offer, stating (214 F. 2d at 371): "We find no authority in the statute supporting the view that the * * * completeness of the affidavits may be challenged in a defense to [complaint] proceedings conducted by the

Board". Cf. *National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F. 2d 645, 650–651 (C. A. 6).

Contrary to the decision below, the question presented here was not resolved, but was left open, by this Court in *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U. S. 322. There, this Court held that the question whether the CIO or A. F. of L. was a national or international labor organization within the meaning of Section 9 (h) presented, upon the "admitted facts", a naked issue of law which was litigable in an unfair labor practice proceeding and subject to judicial review. The Court, however, drew a distinction between the necessity of compliance by a labor organization and the fact of compliance, saying (p. 325)—

> If there were dispute as to whether the CIO had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact.

It is this reserved question which is here presented, namely, whether the Board can determine administratively if the CIO has filed the required affidavits.

The Board is of the view that ascertainment of a union's compliance status has been committed by Congress to the Board's administrative deter-

mination without requiring litigation of the question in unfair labor practice or representation proceedings. The legislative history of Section 9 (h) indicates that Congress in enacting that provision sought especially to safeguard against, and avoid, "indefinite" or "endless delays" which administration of that section might entail in the resolution of the merits of unfair labor practice or representation proceedings.* Manifestly, to permit litigation of such compliance questions in every unfair labor practice or representation proceedings, as the decision below requires, would necessarily hamper the administration of the Act,

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* See statements of Senator Taft at 93 Cong. Rec. 6444, 6447, 6860 (Legislative History of the Labor Management Relations Act, 1947, pp. 1542, 1547, 1625). The Joint Committee on Labor Management Relations, which was created by the Taft-Hartley Act, Section 401, Labor Management Relations Act, 1947, 61 Stat. 136, 160, to study and investigate the administration and operation of existing Federal laws relating to labor relations, in its 1948 report to Congress stressed that in any consideration of amendments to Section 9 (f), (g) and (h) it was important to bear in mind that (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45):

"Board hearings must be confined to evidence going into merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives."

See also *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4); *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U. S. 859; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6).

tend to submerge adjudication of the merits in these proceedings in a welter of side issues and thus defeat the objective of Congress to provide a speedy resolution of cases on the merits.

The delays inherent in such litigation are even more serious under what may be characterized as the "functional test" which the court below adopted, as opposed to the Board's "constitutional test", as to the meaning of the term "officer" in Section 9 (h). Under the test which the decision below embraces,[6] it would appear that, if litigation of compliance issues is permitted in hearings on the merits, proof and counterproof would have to be allowed on a case-to-case basis, whenever an issue of the identity of union officers was raised, with respect to virtually every person performing any duties for the charging union, its international and every other affiliated union, whether or not the position occupied by such person is listed or omitted from the union's constitution.[7] The Board believes, in agreement with the Fifth and Seventh Circuits, that "Congress did not intend that each of the numerous proceedings instituted by the Board upon complaints of violation of the

[6] The court below did not attempt to define the scope of its "functional test". In its brief to the court below, respondent urged that the term "officer" included "every person * * * whose duties, responsibilities and influence in said union measured up to those of an officer as the word 'officer' is usually understood by the American people".

[7] E. g., stewards, organizers, committeemen, international representatives, regional directors, coordinators, etc.

statute against parties throughout the nation should be delayed and determined on a case-to-case basis with all the attendant opportunities for delay in the functioning of the processes of the Act." *National Labor Relations Board v. Valley Furniture Mfg. Co.*, 214 F. 2d 369, 371 (C. A. 5).

In contrast to the litigation method, the administrative method adopted by the Board assures fulfillment of the Congressional purpose without opening the door to the indefinite and endless delays in the resolution of cases on the merits which Congress sought to guard against. It is the Board's practice (*supra*, pp. 6–7) to permit parties to representation or complaint proceedings to cause to be instituted an administrative investigation of those compliance matters which the Board may properly decide, in collateral proceedings before the Board. Upon a proper showing the Board will conduct a hearing in which that issue can be heard and determined. This administrative method of handling the identification of persons as union officers fully and effectively achieves the objective of the Act, but without unnecessary interference with other types of proceedings.

2. In remanding the case to the Board to take evidence with respect to "the functions and extent of jurisdiction of * * * W. B. Taylor as Regional Director of the CIO", the Court of Appeals also rejected the Board's "constitutional test" for determining the meaning of "officers" subject to the filing requirements of Section 9 (h). The Board believes that its test is fully consistent with the basic objectives of the Act and is proper and valid. Since Section 9 (h) does not define the term "officers", Congress must be presumed to have used the word in its usual and ordinary sense. *United States* v. *Stewart,* 311 U. S. 60, 63. Unions, like other organizations, normally list their officers in their constitutions and by-laws. Just as the officer of a private corporation, the officer of a labor organization "is created by the charter". *Vardeman* v. *Penn Mut. Life Ins. Co.,* 125 Ga. 117, 119, 54 S. E. 66, 67.

The Board's construction of the meaning of the term "officers" is reasonably designed to achieve the basic objective of Congress to rid labor unions of Communist leadership. Balancing the competing considerations, Congress apparently concluded that the eradication of Communist influence from the most prominent positions of labor organizations would extirpate the main possibilities of Communist control. While Congress could have extended the filing requirements to all influential agents of the labor organization, it did not see fit to do so. For example, in the Com-

munist Control Act of 1954, 68 Stat. 775, 777, 778,[8] which withdraws from "Communist-infiltrated" organizations certain benefits conferred upon labor organizations by the National Labor Relations Act, the term "Communist-infiltrated" is defined to include substantial direction, domination, or control "by an individual" or group of "individuals", irrespective of the individuals' position in the organization.

Finally, it should be noted that since the Board's definition of the meaning of "officers" as used in Section 9 (h) "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new", it is entitled to "peculiar weight". *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.[9]

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[8] See Sections 7 and 10 which amended the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781 *et seq.*

[9] In August 1947, contemporaneously with the effective date of the 1947 amendments, the General Counsel instructed all personnel responsible for handling of compliance matters that the "officers" required to file non-Communist affidavits "shall include all persons described as 'officers' in the International, National and/or local constitutions and by-laws." This interpretation was subsequently embodied in Section 102.13 (b) of the Board's Rules and Regulations, Series 6, promulgated November 29, 1949, 14 Fed. Reg. 1934, 1938. The rule, as published, made it clear that, where the Board finds persons occupying posi-

The court below, although rejecting the Board's "constitutional test", did not attempt to define the test which it would substitute for that of the Board. Presumably, it agreed with respondent that the determinative factor is not whether the position in question is listed in the union's constitution but whether it encompasses "duties" and "responsibilities" of such a nature as to carry "influence" in the union. The difficulties of applying such a test with its lack of objective standards are manifest and would go far to render Section 9 (h) administratively unworkable.

CONCLUSION

Each of the two issues presented in this case is of substantial importance in the administration of the Act, and the decision of the court below on one of them is in square conflict with decisions of two other courts of appeals. It is respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board.

MAY 1955.

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tions fraudulently omitted from the list of offices in the union constitution, the Board will require the incumbents to file the necessary affidavits.

APPENDIX A—COURT OF APPEALS ORDER

United States Court of Appeals for the Sixth Circuit

Docket No. 12,316

Order February 15, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTELING COMPANY OF LOUISVILLE, INC., RESPONDENT

Before ALLEN, MARTIN and MCALLISTER, Circuit Judges.

This case came on to be heard upon the record and briefs and oral argument of counsel:

And it appearing that respondent at the hearing herein contended that W. B. Taylor, CIO Regional Director for Kentucky, is an officer of the CIO and is required under Section 9 (h) of the Labor Management Relations Act, 29 U. S. C. § 159 (h), to file a non-Communist affidavit;

And it being conceded that said W. B. Taylor had not filed such an affidavit;

And it appearing that in support of its contention respondent offered to show that said W. B. Taylor is an officer of the CIO, that he exercises administrative and executive powers over United Brewery and Soft Drink Workers Local 20, and

exercises a working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region;

And it appearing that the Trial Examiner excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceedings, in which action the Trial Examiner was sustained by the Board;

And it appearing that respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9 (h); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326;

The case is hereby remanded with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to this court.

Approved for entry:

(S) FLORENCE E. ALLEN,
United States Circuit Judge

APPENDIX B—RULE INVOLVED

Section 102.13 (b) of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 Fed. Reg. 1934; 1938, provides:

> SEC. 102.13. * * *
>
> (b) for the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:
>
> (1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period; listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.
>
> (2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports

any organization that believes in or teaches, the overthrow of the United States Government by force ~~or by any ill~~legal or unconstitutional methods.

(3) The term "officer" as used in subsection (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.

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No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Farmer v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36, certiorari denied, 347 U. S. 943	27
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	43
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Goodman Manufacturing Co. v. *National Labor Relations Board*, decided November 10, 1955 (C. A. 7)	36, 48, 50
Gray v. *Powell*, 314 U. S. 402	66
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Marzani v. *United States*, 168 F. 2d 133, affirmed, 335 U. S. 895	41
Metropolitan Life Insurance Co., 90 N. L. R. B. 935	40
National Labor Relations Board v. *Clausen*, 188 F. 2d 439, certiorari denied, 342 U. S. 868	45
National Labor Relations Board v. *Coal Creek Co.*, 204 F. 2d 579	45
National Labor Relations Board v. *Dant*, 344 U. S. 375	16, 19, 29, 40, 58, 60
National Labor Relations Board v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840	17, 26, 38
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	65, 66
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National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U. S. 9	30
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National Labor Relations Board v. *Red Rock Co.*, 187 F. 2d 76	26
National Labor Relations Board v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, certiorari denied, 346 U. S. 887	44
National Labor Relations Board v. *L. Rosney & Sons Fur. Mfg. Co.*, 206 F. 2d 730, certiorari denied, 346 U. S. 937	45
National Labor Relations Board v. *Sharples Chemicals, Inc.*, 209 F. 2d 645	16, 26, 27, 42, 43, 48
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National Labor Relations Board v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, certiorari denied, 348 U. S. 873	27, 29, 36, 43

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National Labor Relations Board v. *Wiltse*, 188 F. 2d 917, certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U. S. 859	25, 26
National Maritime Union of America v. *Herzog*, 78 F. Supp. 146, affirmed, 334 U. S. 854	44
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Publishers Printing Co., Inc., 110 N. L. R. B. 55	45
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	66
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West Texas Utilities Co., Inc. v. *National Labor Relations Board*, 184 F. 2d 233, certiorari denied, 341 U. S. 939	45
White v. *Herzog*, 80 F. Supp. 407	45

Statutes:

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93 Cong. Rec. 6860, Leg. Hist. 1625	23
93 Cong. Rec. A–1035, Leg. Hist. 993	55, 56
93 Cong. Rec. A–1911, Leg. Hist. 869	44
93 Cong. Rec. A–3044, Leg. Hist. 1627, 1628	56
95 Cong. Rec. 5589	58
93 Cong. Rec. 7720, 7791, 7796	59
Daily Labor Report, August 19, 1947, No. 162, p. A–1	48
Dankert, Clyde E., *Contemporary Unionism in the United States* (Prentice-Hall, Inc., 1948), p. 115	53
Davis, K. C., *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 559, 572	66
Gardner and Moore, *Human Relations in Industry* (Richard D. Irwin, Inc., 1950), pp. 142–143	53
Ginzberg, *The Labor Leader* (Macmillan Co., 1948), p. 41	63
A Guide for Labor Organizations, N. L. R. B. Affidavit Compliance Branch	17, 48
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H. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., p. 53, Leg. Hist. 344	44
Hardman & Neufeld, *The House of Labor* (Prentice-Hall, Inc., 1951), p. 11	8
Legislative History of the Labor Management Relations Act, 1947 (Govt. Print. Off., 1948), pp. 190, 251	21
Lester, *Labor and Industrial Relations* (Macmillan Co., 1951), pp. 129–130	52
Miller & Form, *Industrial Sociology* (Harper & Brothers, 1951), pp. 238, 246, 250	52, 54, 63
N. L. R. B., *Thirteenth Annual Report* (1948), pp. 14–16	20
N. L. R. B., *Fourteenth Annual Report* (1949), p. 16	61
N. L. R. B., *Fifteenth Annual Report* (1950), pp. 19–20	20, 49

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N. L. R. B., *Seventeenth Annual Report* (1952), p. 26	41
N. L. R. B., *Nineteenth Annual Report* (1954), pp. 10–11	41
Peterson, *International Unions, in Bakke and Clark, Unions, Management and the Public* (Harcourt, Brace & Co., 1948), p. 174	53
Peterson, *Survey of Labor Economics* (Harper & Brothers, 1951), pp. 521, 522, 523	52, 54
Report to the CIO by President Walter P. Reuther, 15th Constitutional Convention (1953), p. 28	8
Sayles and Strauss, *The Local Union: Its Place in the Industrial Plant* (Harper & Brothers, 1953), pp. 10–11	53
S. 249, 81st Cong., 1st Sess	58, 59
S. 655, 83d Cong., 1st Sess	59
S. 2650, 83d Cong., 2d Sess	59
S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., pp. 3, 45	24, 59
S. Rep. No. 99, Part 2, 81st Cong., 1st Sess., pp. 45–48, 51–52	58
Slichter, *The Challenge of Industrial Relations: Trade Unions, Management and the Public Interest* (Cornell University Press, 1947), pp. 104–105	52

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 79

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ORDERS AND OPINIONS BELOW

The order of the Court of Appeals (R. 541a) is reported at 219 F. 2d 441. No separate opinion accompanied this order. The findings of fact, conclusions of law and order of the Board (R. 392a–537a) are reported at 108 N. L. R. B. 490.

JURISDICTION

The order of the Court of Appeals (R. 541a) was entered on February 15, 1955. The petition for a writ of certiorari was filed May 13, 1955, and was granted October 10, 1955 (R. 542a). The jurisdiction of this Court rests on 28 U. S. C.

1254, and Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. at 147, 29 U. S. C. 160 (e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly held that the question of whether or not all of the officers of a labor organization have filed the non-Communist affidavits required by Section 9 (h) of the National Labor Relations Act may not be litigated in a Board unfair labor practice proceeding but is a matter for the Board to investigate and determine in separate administrative proceedings.

2. Whether the Board could properly hold that, in the absence of purposeful evasion as provided in its Rules and Regulations, the term "officer" within the meaning of Section 9 (h) is limited exclusively to a person occupying a position identified as an office in a union's constitution.

STATUTE AND RULE INVOLVED

Sections 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h), are set forth in the Appendix, *infra*, pp. 67–70. Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. 102.13, is set forth in the Appendix, *infra*, pp. 70–72.

STATEMENT

This case arises out of an unfair labor practice proceeding commenced before the National Labor Relations Board on a complaint brought by a union against respondent Coca-Cola Bottling Co. of Louisville, Inc. During the proceedings, respondent sought to litigate the question of whether there had been full union compliance with the non-Communist affidavit requirements of Section 9 (h) of the National Labor Relations Act, as amended (App., *infra*, pp. 69–70).

The Board, in finding that respondent had committed certain unfair labor practices, held, *inter alia*, that (a) the compliance status of the union under Section 9 (h) was a matter for determination by the Board in collateral administrative proceedings and not one which should be litigated directly in an unfair labor practice case; and (b) in any event respondent's offer of proof related to a union employee who did not come within the definition of a union "officer", within the meaning of Section 9 (h) of the Act (R. 527a-531a). When the Board petitioned the Court of Appeals for the Sixth Circuit to enforce its remedial order (R. 538a–539a), that court ordered the case remanded to the Board with directions to reopen the record in the unfair labor practice proceedings so as to permit respondent to adduce evidence as to the union's Section 9 (h) compliance status (R. 541a).

The detailed facts pertinent to the issues raised may be summarized as follows:

1. *Proceedings before the Board:* On May 17 and October 16, 1951, the United Brewery and Soft Drink Workers Local 20 (the Local), an affiliate of the Congress of Industrial Organizations (the CIO), filed unfair labor practice charges alleging that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act. The Board's General Counsel thereupon issued a complaint based on these charges (R. 5a–7a), it having been theretofore administratively determined that the Local and its affiliated unions, including the CIO, had complied with the non-Communist affidavit requirements of Section 9 (h) of the Act (R. 27a–29a, 516a–517a).

At the hearing on the complaint before a Board trial examiner, respondent sought to show that the CIO was not in compliance with Section 9 (h) of the Act, on the ground that one W. B. Taylor, CIO regional director for Kentucky and allegedly an officer of the CIO, had not filed a non-Communist affidavit. In support of its position respondent offered to adduce evidence purporting to show that Taylor exercised "administrative and executive duties and powers" over the Local and every union affiliated with the CIO in the State of Kentucky; and that Taylor "has been very active in his advice and in the prosecution" of the proceeding before the Board (R. 517a, 527a; 387a–389a). Respondent contended that Taylor's

duties and functions were such as to make him an officer of the CIO within the meaning of Section 9 (h). The trial examiner rejected the offer, holding, in conformity with the uniform decisions of the Board, that the question of compliance was a matter for administrative determination by the Board, and was not litigable by the parties in the unfair labor practice proceeding (R. 517a–518a). On the merits the trial examiner found that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act, as alleged in the complaint (R. 395a–515a, 521a).

2. *The Board's decision:* The Board upheld both the trial examiner's rulings on the procedural question and his findings on the merits (R. 526a–533a). Reaffirming its rule that "the compliance status of a union which is required to comply is a matter for administrative determination, and not one to be litigated in complaint or representation proceedings", the Board stated (R. 528a–529a):

> A recognition of the [n]eed to expedite the hearing of cases and the resolution of issues on their merits was the reason for the adoption, and still is the reason for the retention, of this rule. Although adhering to such rule, the Board has nevertheless permitted, and even encouraged, parties to Board proceedings to bring to the Board's attention matters affecting the compliance status of unions. The Board thus has specifically provided in Section 102.13 (b) (3)

> of its Rules and Regulations, Series 6, as amended, for an investigation "where the Board has reasonable cause to believe" the filing requirements of Section 9 (h) of the Act are being purposely evaded, as is now contended by the Respondent. To assist the parties in calling such matters to its attention, the Board has adopted the policy of having its agents release to interested parties, under proper safeguards, names of designated union officers and of persons who have filed the required affidavits. Furthermore, the Board will entertain motions regarding the compliance status of unions, will consider such information as may be submitted in determining whether a situation warrants further investigation, and has in fact conducted such investigations. If the need therefor is shown, the Board will conduct a hearing in which the issue can be heard and determined. The occasion thus afforded the parties to institute collateral proceedings, and to have compliance matters heard and decided, is real and not illusory for the outcome of such a collateral proceeding may affect the substantive aspects of a pending case. [Footnotes omitted.]

The Board then pointed out that respondent had not availed itself of the Board's established procedure for determining compliance questions. It noted (R. 530a) that respondent, although apprised of Taylor's failure to file a non-Commu-

nist affidavit,[1] had not requested a collateral administrative proceeding but, instead, sought to raise the issue in the unfair labor practice case.

The Board further stated (R. 530a–531a) that, even if respondent, in accordance with the Board's practice, had properly raised the compliance question in a separate collateral proceeding, respondent's offer of proof would fall short of establishing that Taylor was an "officer" within the meaning of Section 9 (h) under the test previously adopted by the Board and incorporated in Section 102.13 (b) (3) of its Rules and Regulations (App., *infra*, pp. 71–72). Under this test, the Board treats as an "officer" a person occupying a position identified as an office in the union's constitution, or occupying a position which the union has omitted from the designation of officers in its constitution for the purpose of evading or circumventing the filing requirements of Section 9 (h) (App., *infra*, pp. 69–70). Applying this test, the Board found that Taylor was not an "officer", since it did not appear either that Taylor was occupying a position listed as an office in the CIO constitution or that the position which he occupied had been omitted from the

[1] Prior to the institution of the unfair labor practice hearing, and thereafter again in course of the hearing, respondent requested and obtained compliance information from the Board which, among other things, disclosed that Taylor had not filed a non-Communist affidavit (R. 528a, fn. 7; 25a–29a).

constitution in order to evade or circumvent the filing requirements of the Act (R. 531a).[2]

Accordingly, the Board concluded that the CIO was in compliance with the filing requirements of Section 9 (h), and entered an appropriate remedial order (R. 533a–537a).[3]

3. *Proceedings in the Court of Appeals:* Upon the Board's petition for enforcement of its remedial order, the Sixth Circuit, without passing upon the merits of the Board's unfair labor practice findings, ordered the case remanded to the Board for further proceedings (R. 541a). The

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[2] The CIO's constitution (Article IV, Section 1) lists the following officers: president, executive vice president, secretary-treasurer and eight vice presidents, all elected by a majority vote at its annual convention. Neither the current constitution nor the constitutions prior to the enactment of the Taft-Hartley Act listed the position of regional director as an office. The regional directors are under the supervision of the CIO's organizational department which in turn is directed by the executive vice president (Article V, Section 5, of the CIO's constitution); Hardman & Neufeld, *The House of Labor* (Prentice-Hall, Inc., 1951), p. 11; Report to the CIO by President Walter P. Reuther, 15th Constitutional Convention (1953), p. 28.

[3] Two of the four Board members (Chairman Farmer and Member Rodgers), who participated in the decision in the instant case, joined in the conclusion that the CIO was in compliance with the Act under the Board's "constitutional test," but reserved decision on whether such test is "the exclusive basis for determining compliance" (R. 531a, fn. 15). Subsequently Chairman Farmer and Member Rodgers followed and applied the "constitutional test" in other cases without expressing any reservation. See *General Shoe Corp.*, 109 N. L. R. B. 618, and *Crown Upholstering Co.*, 110 N. L. R. B. 22.

court noted in its order that concededly Taylor had not filed a Section 9 (h) affidavit; that respondent had offered to prove that Taylor is "an officer of the CIO" exercising "administrative and executive powers over" the Local and a "working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region"; and that the trial examiner, with the subsequent approval of the Board, had excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceeding. Relying on this Court's decision in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, the court stated that "respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9 (h)" of the Act. Accordingly, it remanded the case to the Board "with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to [the] court" (R. 541a).

SUMMARY OF ARGUMENT

I

The ascertainment of a union's compliance status under Section 9 (h) of the National Labor

Relations Act (App., *infra*, pp. 69–70) has been committed by Congress to the Board's administrative determination without requiring litigation of the question in unfair labor practice or representation proceedings. The reason underlying the statutory scheme in this respect is the need to expedite the hearing of cases and the resolution of issues on their merits. The legislative history of Section 9 (h) discloses that in enacting that section in its present form Congress sought especially to safeguard against the "indefinite" or "endless delays," in the resolution of the merits of unfair labor practice or representation proceedings, which administration of that section in such proceedings might entail.

To permit litigation of a union's compliance status under Section 9 (h) in the course of hearings in unfair labor practice or representation proceedings would open a host of issues totally unrelated to whether an unfair labor practice had been committed or to the determination of the employees' choice of a bargaining representative. In either case it would permit numerous opportunities for delay in the final adjudication of such matters on the merits. The determination of a union's compliance status is a continuing process requiring the resolution of many questions of fact. If each of the subsidiary questions upon which a compliance determination rests could be called into question in hearings on

the merits, the resolution of the latter would be submerged in a welter of side issues. To construe the Act as requiring litigation of such issues in hearings on the merits would seriously impede and delay the real function of the Board in deciding unfair labor practice cases and determining bargaining representatives and tend to make the statute administratively unworkable.

The view that the Board need not permit litigation of compliance status in hearings on the merits is confirmed by the scheme of the parallel provisions of Sections 9 (f) and (g) (App., *infra*, pp. 67–69). Compliance with those sections was definitely not intended by Congress to be litigable. There is no discernible basis for concluding that Congress intended to draw a distinction between litigability of compliance under Sections 9 (f) and (g) on the one hand and Section 9 (h) on the other.

The collateral administrative procedure adopted by the Board for the determination of a union's compliance status effectuates the Congressional purpose. It operates to keep both the compliance proceeding and the proceeding on the merits within bounds and avoids a diffusion of the issue in different types of proceedings dealing with entirely unrelated matters. It permits the Board to dispose of the compliance question on a union-by-union basis instead of an unworkable case-by-case basis.

II

The Board's construction of the term "officer" in Section 9 (h) to mean a person occupying a position identified as an office in a union's constitution or bylaws is reasonable and proper. Since the Act does not define the term, Congress must be presumed to have used the word in its normal and ordinary sense. The Board's definition of the term accords with the normal understanding of the term commonly accepted in the field of labor relations as well as in corporate law.

Moreover, in Section 9 (f), Congress required operational and financial information concerning "officers or agents" and "officers or stewards". If Congress had meant to require non-Communist affidavits from union agents other than "officers" in the commonly understood sense of the latter term, it had a simple way to express that intention as it did in Section 9 (f). The use of the different terminology in the two related sections, simultaneously enacted, furnishes a strong presumption that Congress in Section 9 (h) purposefully drew a distinction between "officers" and "agents" and used the term "officer" to cover persons occupying positions listed in the union's organic instruments. Legislative proposals dealing with Section 9 (h) since its amendment, and the accompanying legislative history, confirm the propriety of the Board's reading of the Section.

The Board's definition accords with the Congressional purpose in enacting Section 9 (h) and is reasonably calculated to effectuate that purpose. Weighing the evil which it sought to remedy against the practical administration of Section 9 (h), Congress apparently concluded that eradication of Communist influence from the most prominent positions of labor organizations would extirpate the main possibilities of Communist control. Congress could have extended the coverage of Section 9 (h) to include all "influential" union agents. The difficulties inherent in the administration of a "leadership" or "influential" test may well have prompted Congress to draw the line at "officers." In these circumstances the Board's interpretation is entitled to peculiar weight for it represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315).

ARGUMENT

INTRODUCTION

In *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, this Court considered the question whether a parent labor federation, such as the CIO, was a national or international labor organization within the

meaning of Section 9 (h) of the Act (App., *infra*, pp. 69–70) and therefore subject to the filing requirements of that section. In concluding that the CIO fell within the statutory definition, the Court held that the question whether a labor organization was required to comply with Section 9 (h) was litigable and judicially reviewable in an unfair labor practice proceeding where, as in that case, the determination of that question turned upon "admitted facts" and presented only an issue of law.

One of the issues presented in this case is whether a party to an unfair labor practice case may litigate in that proceeding the question whether a labor organization, such as the CIO whose officers under the *Highland Park* decision are *required* to file non-Communist affidavits, has *in fact* met the filing requirements. Contrary to the ruling below, the Board is of the view, as more fully set forth below under Point I (*infra*, pp. 15–48), that ascertainment of a union's compliance status under Section 9 (h) has been committed by Congress to the Board's administrative determination without requiring litigation of the question in each unfair labor practice or representation proceeding where raised as an issue.

The further issue is also here posed, whether the Board's "constitutional test" for determining who are "officers" of labor organizations for purposes of Section 9 (h) is proper and valid. Re-

jecting this test, the court below held that the determinative factor is not the listing of the position in question in the union's constitution but rather "the functions and extent of jurisdiction" lodged in the individual in question (R. 541a). As we explain below under Point II (*infra*, pp. 48–66), the test adopted by the court below, with its lack of objective standards, would go far to render Section 9 (h) administratively unworkable. The test adopted by the Board avoids this serious obstacle and squarely comports with the Congressional purpose.

I

THE ASCERTAINMENT OF A UNION'S COMPLIANCE STATUS HAS BEEN COMMITTED BY CONGRESS TO THE BOARD'S ADMINISTRATIVE DETERMINATION WITHOUT REQUIRING LITIGATION OF THE QUESTION IN UNFAIR LABOR PRACTICE OR REPRESENTATION PROCEEDINGS

A. THE PROCEDURAL PROVISIONS OF SECTIONS 9 (f), (g), AND (h) AND THE BOARD'S METHOD OF DETERMINING COMPLIANCE WITH THESE SECTIONS

Sections 9 (f), (g), and (h) (App., *infra*, pp. 67–70) were incorporated into the Act by the 1947 Taft-Hartley amendments which became effective on August 22, 1947. Under these sections a labor organization desiring to utilize the facilities of the Board must, as a condition precedent, file certain financial and operational statements with the Secretary of Labor, furnish its members with

annual financial reports, and file with the Board non-Communist affidavits for each of its officers. Unless these filing and reporting requirements are complied with, the Board may not investigate a question concerning representation raised by, nor issue a complaint based upon unfair labor practice charges filed by, a noncomplying union. *National Labor Relations Board* v. *Dant*, 344 U. S. 375.

The statute does not establish any procedure, formal or informal, to be followed by the Secretary of Labor or the Board in determining whether affidavits and information filed by labor organizations pursuant to Sections 9 (f), (g), and (h) satisfy the filing requirements. "There is nothing in the Act requiring the Board to hold a judicial hearing on the question of compliance. Rather, the effect of the Act is to make its provisions effective and available to a union upon the occurrence of a certain event and it becomes the duty of the Board to determine whether that event has occurred." *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6).

To meet the obligation imposed upon it by the statute, the Board established elaborate administrative machinery for the purpose of enabling it to determine whether the moving labor organization has properly complied with the requirements of Sections 9 (f) (g), and (h). See Rules

and Regulations of the National Labor Relations Board, Series 6, 29 C. F. R. Section 102.13 (App., *infra*, pp. 70–72); *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 844 (C. A. 4). An Affidavit Compliance Branch was established within the Board in order to keep records, send notifications of lapses in compliance, and carry on the other activities incidental to the proper exercise of the Board's statutory duties.[4]

When the material required by Sections 9 (f), (g) and (h) is initially filed with the regional director, a careful examination of the forms and their contents is made by the regional office. An investigation may be made if the regional director

[4] In addition to the Affidavit Compliance Branch, each regional office keeps records of the compliance status of local unions within its area.

[5] The Compliance Branch has printed and distributed to unions a booklet called *A Guide for Labor Organizations*, which describes the procedures and forms established by the Board and the Department of Labor for complying with the filing requirements. These forms, which are available at the Board's regional offices, include the non-Communist affidavit (Form NLRB–1081), a certificate of distribution of financial data (Form NLRB–1085), a certificate of union officers (Form NLRB–1080), and a certificate of intent to remain in compliance (Form NLRB–3054). The Department of Labor also publishes a form for furnishing the required financial information (Form No. 44–R700). When this latter form is accepted by the Secretary of Labor, a letter certifying that fact is sent to the union, which in turn sends a copy to the Affidavit Compliance Branch of the Board.

is not satisfied with the certificate of distribution of financial data. In the case of non-Communist affidavits, a cross-check is made against the certificate of union officers, which is in turn checked against the union constitution and bylaws. Where investigation discloses that an office was fraudulently omitted from the constitution for the purpose of evading the filing requirements the Board may require affidavits from those who hold such positions (App., *infra*, p. 72). Incorrectly prepared reports or affidavits are rejected and follow-ups on them are required. When all the documents are finally ready for filing, they are sent to the Affidavit Compliance Branch in Washington, D. C., and the regional office retains the information on separate records. Thus at any given time it is possible for the Board and legitimately interested persons to learn the compliance status of any union.

When a case is initiated before the Board by a petitioning or charging union, compliance is checked not once, but continually throughout the pendency of the matter. In an unfair labor practice case, checks must be made during the investigation prior to the issuance of a complaint, which is the critical date, and before an order to bargain is entered in the case of a violation of Section 8 (a) (5). In representation cases, since no certification will issue in favor of a union not in compliance at the time of certification, periodic checks as to the union's compliance are

made after the filing of the petition, including a check at the time the Board orders an election, and another before certification of the results of the election. Continued policing of compliance is necessitated because lapses in compliance frequently result from vacancies in union offices, changes in organizational structure and other circumstances. *National Labor Relations Board v. Dant*, 344 U. S. 375, 383.

Thus, the policing of compliance is not concentrated upon any one particular period in point of time. It is an all-year-round subject of inquiry, in which the branch of the agency vested with the policing function deals with day-to-day fluctuations in the status of many thousands of unions which have filed the numerous prescribed documents with it.

B. CONGRESS DID NOT INTEND TO REQUIRE THE BOARD TO PERMIT LITIGATION OF THE COMPLIANCE STATUS OF A LABOR ORGANIZATION, UNDER SECTION 9 (h), IN A REPRESENTATION OR COMPLAINT PROCEEDING.

In one of the earliest cases (a representation proceeding) dealing with the compliance question, the Board stated: "In view of the language of those sections * * * precluding *the Board* from investigating any question concerning the representation of employees where the requirements have not been met, the matter of compliance is clearly one for the Board to determine in any manner suited to the circumstances." *Lion Oil Company*, 76 N. L. R. B. 565, 566.

(1948). The Board has uniformly taken the position that the question whether a particular union is in fact in compliance with the filing requirements of Sections 9 (f), (g), and (h) is a question to be determined administratively by the agency and may not be litigated in a representation or unfair labor practice proceeding.[6] The underlying reason for this position was explained by the Board in the instant case when it stated (R. 528a): "A recognition of the need to expedite the hearing of cases and the resolution of issues on their merits was the reason for the adoption and still is the reason for the retention of this rule."

The legislative history of Section 9 (h) establishes that Congress in enacting that provision sought especially to safeguard against and avoid "indefinite" or "endless delays" which administration of that section might entail in the resolution of the merits of unfair labor practice or representation proceedings. Indeed, the same considerations which the Board has emphasized, namely, "the need to expedite the hearing of cases and the resolution of issues on their merits" without becoming bogged down in compliance matters, also prompted the Congress which en-

[6] See National Labor Relations Board, *Thirteenth Annual Report* (1948), pp. 14–16; National Labor Relations Board, *Fifteenth Annual Report* (1950), pp. 19–20; *The Baldwin Locomotive Works*, 76 N. L. R. B. 922, 923; *Comfort Spring Corp.*, 90 N. L. R. B. 173; *Luckenbach Steamship Co., Inc.*, 103 N. L. R. B. 1.

acted Section 9 (h) to eliminate from earlier versions of this section features which had been criticized as creating endless delays in Board proceedings on the merits. As originally passed by the House and the Senate,[7] Section 9 (h) provided in substance that no labor organization should be eligible for certification as a collective bargaining representative if its officers were members of the Communist Party or held other proscribed membership, affiliation or belief. This proposed amendment, which would have required the Board to ascertain as a matter of fact whether the union officers were Communists, was changed in conference to its present form, so as not to compel the Board to make that determination. Explaining this change to the Senate, Senator Taft said (93 Cong. Rec. 6444; Leg. Hist., p. 1542):

> Subsection 9 (h) of the conference agreement embodies the principle of an amendment adopted when the bill was being considered on the floor of the Senate which would have prevented a labor organization from being eligible for certification if any of its local, national, or international officers were members or affiliates of the Communist Party or believed in or supported

[7] H. R. 3020, 80th Cong., 1st Sess., Sec. 9 (f) (6); Legislative History of the Labor Management Relations Act, 1947 (Govt. Print. Off. 1948), hereafter referred to "Leg. Hist.", p. 196.

[8] H. R. 3020, 80th Cong., 1st Sess., Sec. 9 (h); Leg. Hist. 251.

organizations advocating the overthrow of the United States Government by force or any other illegal or unconstitutional method. There was a similar provision in the House bill, although the language was somewhat different. *In reconciling the two provisions the conferees took into account the fact that representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation.* The conference agreement provides that no certification shall be made or any complaint issued unless the labor organization in question submits affidavits executed by each of its officers and officers of its national or international body, to the effect that they are not members or affiliates of the Communist Party or any other proscribed organization. [Emphasis added.]

In response to a query on the floor of the Senate, Senator Taft said (93 Cong. Rec. 6447; Leg. Hist., p. 1547):

* * * The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. *Otherwise, the way it was passed by the*

> *Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist.* Today it is provided that officers shall file statements to the effect that they are not Communists. [Emphasis added.]

In a Supplementary Analysis of the Act submitted to the Senate on June 12, 1947 (93 Cong. Rec. 6860, Leg. Hist., p. 1625), Senator Taft further explained:

> Section 9 (h). This provision making the filing of affidavits with respect to Communist Party affiliation by its officers a condition precedent to use of the processes of the Board has been criticized as creating endless delays. It was to prevent such delays that this provision was amended by the conferees. Under both the Senate and House bills the Board's certification proceedings could have been indefinitely delayed while it investigated and determined Communist Party affiliation.

The Board's position that compliance under Section 9 (h) is to be determined administratively by the agency and may not be litigated by the parties in the course of hearings on representation or unfair labor practice questions has been approved by the Joint Committee on Labor-Management Relations, created by Section 401 of the Taft-Hartley Act, 61 Stat. 136, 160, to study and investigate "the administration and operation of existing Federal laws relating to labor relations" (Sec. 402). Reporting to Con-

gress in 1948, the Committee, after recommending that Section 9 (h) be amended in certain respects, declared as follows (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45):

> The committee wishes to emphasize as strongly as possible that in any consideration of amendments to this section, great care must be given to prevent litigation of the question in Board hearings. If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to it having been filed, records will be hopelessly overburdened with such proof. Board hearings must be confined to evidence going into merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives. The Board recognized this principle in *Lion Oil Co.* (15–R–2264) when it upheld the ruling of the hearing officer in his denial of the employer's motion to dismiss the petition since the record did not show the petitioning union had complied with the requirements of Section 9 (f) and (h). The Board said that compliance is clearly for the Board to determine and its official records indicated that the union had complied.

In view of the character of that Committee and the purposes for which it was set up, and the continuing scrutiny which Congress has accorded to the amended Act, the Committee's endorsement

of the Board's position is "persuasive evidence of the adoption by Congress of the construction given the filing requirements here in question by the Board, in the *Lion Oil Co.* case". *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.*, v. *National Labor Relations Board*, 342 U. S. 859.

The foregoing legislative history reflects, we think, a broad Congressional purpose to commit the ascertainment of compliance status under Section 9 (h) to the Board's administrative determination without requiring litigation of the question in unfair labor practice or representation proceedings. Congress thus sought to insure that the determination of a union's compliance status would not unduly prolong or defer the resolution of the merits of representation and unfair labor practice proceedings.

To effectuate the policy of Congress as evidenced by this legislative history, the courts have consistently held that in unfair labor practice cases the Board is not required either to allege or to prove that the charging union has in fact complied with Sections 9 (f), (g), and (h) when the complaint was issued. The Board has therefore not been required to include as part of the record in an unfair labor practice proceeding its determination that the charging union had complied, or to open to attack the bases upon which

its determination rested. Thus, in *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4), the court, in rejecting the view urged by the employer that in an unfair labor practice proceeding the Board's General Counsel must allege and prove that the union was in compliance, stated:

> There is nothing in the language of the statute expressly requiring this; and if such view were to be taken, it would greatly hamper the administration of the act, since it would be incumbent upon the general counsel to show compliance, not only with the requirements as to filing affidavits but also with those requiring the giving of notice to members * * *. Surely nothing of the sort was contemplated in the passage of the statute; and it is well settled that the courts will not construe a statute in such way as to make it administratively unworkable if any other construction is possible.

Accord: *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 77–78 (C. A. 5); *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U. S. 859; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650 (C. A. 6); *Law* v. *National Labor Relations Board*, 192 F. 2d 236, 239 (C. A. 10); *Victor Products Corp.* v. *National Labor Relations Board*, 208 F. 2d 834 (C. A. D. C.).

Similarly the courts have held that the "truthfulness" of the non-Communist affidavits filed by the labor organization is not litigable in unfair labor practice proceedings. "With respect to the verity of the non-Communist affidavits * * * the type of problem involved and the history of the statute do not indicate any intention on the part of Congress to permit the respondent in an unfair labor practice proceeding to raise and litigate in that proceeding the question of compliance on the part of the charging union." *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371–372 (C. A. 5), certiorari denied, 348 U. S. 873; cf. *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968; *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943.

The Congressional purpose not to require litigation of compliance status under Section 9 (h) in representation or complaint proceedings is shown in yet another way. As to the requirement of Sections 9 (f) and (g) that unions submit financial reports, it is manifest that Congress did not contemplate litigation, since the financial reports which unions were to file under those sections were "not [to be] made open to the public". (See Senator Taft's and Senator Smith's explanations at 93 Cong. Rec. 3839, 4284, Leg. Hist.

1014, 1150.) In executing its functions under Sections 9 (f) and (g) in accordance with this Congressional object, the Department of Labor in 1949 issued a General Regulation (General Regulations of the Office of the Secretary of Labor, 29 C. F. R. (1955 Supp.) 2.4) stating that none of its officers or employees "shall make such information public, nor disclose such information to any person outside of the Department of Labor except upon written request", to interested and affected union members, the Board, the courts and certain Congressional committees.

To permit litigation concerning union compliance with Sections 9 (f) and (g) in representation or complaint proceedings would be completely incompatible with this Congressional objective of not making the reports public, because the reports themselves would have to be introduced in evidence and would thereby be made available to the public. Without access to the reports employers lack the necessary information upon which any attack upon the accuracy or completeness of the union's compliance with the statutory requirements could be based.

Beyond this, Congress' division of responsibility for administering Sections 9 (f) and (g) between the Secretary of Labor and the Board makes it apparent that Congress did not contemplate or intend that a union's compliance with the section would be litigable. The documents

and information contemplated by Sections 9 (f) and (g) must be filed with the Secretary of Labor. The Secretary of Labor, not the Board, was entrusted with initial responsibility for determining the form and content of the information to be filed, and the adequacy, accuracy and completeness of information. The Board has assumed, in the absence of clear evidence to the contrary, that Congress could not have intended that the Board should act as a reviewing or revisory agency over determinations of the Secretary of Labor. To hold that the union's compliance with Sections 9 (f) and (g) is litigable in representation or unfair labor practice proceedings would place in issue the administrative determinations of the Secretary of Labor. Indeed, the Secretary would be required to defend his determinations both before the Board and in the courts. Such a purpose cannot reasonably be attributed to Congress.

Sections 9 (f), (g), and (h) are parallel provisions; there is no discernible basis for concluding that Congress had a purpose that one should raise litigable issues respecting compliance status and that the others should not. *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371–372, n. 3 (C. A. 5), certiorari denied, 348 U. S. 873. Cf. *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 383, where this Court stated: "It would seem that the construction of § 9 (h) * * * would lead to a like construction of § 9 (f) and (g)."

C. TO REQUIRE THE BOARD TO PERMIT LITIGATION OF THE QUESTION OF A UNION'S COMPLIANCE STATUS IN REPRESENTATION OR COMPLAINT PROCEEDINGS WOULD CREATE INNUMERABLE OPPORTUNITIES FOR DELAY AND WOULD THUS SUBSTANTIALLY IMPAIR THE BOARD'S ABILITY TO PERFORM ITS PRINCIPAL STATUTORY FUNCTIONS UNDER THE ACT

The issue in an unfair labor practice proceeding, as here, is, of course, whether "any person named in the complaint has engaged in or is engaging in any such unfair labor practice". Section 10 (c) of the Act. "When a Board complaint issues, the question is only the truth of its accusations." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18. In a representation proceeding, there is involved the determination of the employees' choice of bargaining representative. Section 9 (a), (b), and (c).

To permit litigation in each unfair labor practice or representation proceeding where the fact of compliance by a union was raised as an issue, as distinguished from the necessity of compliance, would open a host of issues unrelated to the unfair labor practices dealt with in the complaint or the determination of the employees' choice of bargaining representation and in either case would permit numerous opportunities for delay in the final adjudication of those matters. As shown, *supra*, pp. 16–19, the determination of compliance is not a simple matter. It requires resolution of many questions of fact. If each of the subsidiary questions upon which a compliance determination

rests could be called into question in an unfair labor practice or representation proceeding, the merits would be submerged in a welter of side issues.

Moreover, the issue would be subject to litigation in every unfair labor practice or representation proceeding wherever it was raised. The Board's determination in any particular case that the officers of a union had complied with the filing requirements would not foreclose parties in other unfair labor practice or representation proceedings, either pending or arising in the future, from reopening the issue in those proceedings since the Board's resolution of the issue in one case would not be binding on other parties in other cases.

The inquiry posed in this case—whether a labor organization is not in compliance because one of its alleged officers failed to file a non-Communist affidavit—illustrates the serious difficulties which the ruling below creates in the administration of the Act. At the hearing respondent offered to show that one W. P. Taylor, CIO Regional Director for Kentucky, was, by reason of his position with the CIO, an "officer" of that union. Respondent contended that because of Taylor's failure to file the CIO was not in compliance with Section 9 (h). In support of its position, respondent offered to show that Taylor exercises "administrative and executive duties and powers over" the charging local, an affiliate of the CIO, and every other CIO local union and affiliated

international union in Kentucky; and that Taylor "has been very active in his advice and in the prosecution of this cause" (R. 517a, 527a, 387a-389a).

It is evident that to substantiate its position respondent would have had to introduce evidence as to the organizational structure of the CIO and its affiliated international and local unions in the State of Kentucky. Respondent would have had to establish Taylor's role in the operation of these unions,[9] his connections with them, the extent of his direction of, and participation in, the affairs of such unions, including their collective bargaining negotiations, their meetings, organizational drives, and so far as the instant case is concerned, Taylor's role in the prosecution of the instant unfair labor practice proceeding. In this connection, respondent might have required, in addition to the testimony of union officials and others, the production of the minutes of meetings, bylaws and constitutions of all of the unions with which Taylor was in any way connected.

The far-reaching scope of the inquiry underscores the reality of the danger, which the Joint Committee anticipated, of having records in either unfair labor practice or representation hearings "hopelessly overburdened with such proof" (*supra*, p. 24). It would be strange

[9] We are informed that the CIO is affiliated with seventeen international unions and eighty-eight local unions in the State of Kentucky.

indeed to find that Congress closed the door to the vexing delay which would arise from permitting inquiry by an employer either in an unfair labor practice or representation proceeding into the veracity of a non-Communist affidavit only to leave the door open to similar delay by requiring the Board to permit inquiry by an employee in each proceeding whenever the union's compliance status was challenged. In its report (*supra*, p. 24), the Joint Committee pointed out the identity of the considerations involved, for it appropriately observed that it was important "to prevent litigation" not only of the "veracity of the affidavit", but also as to "its having been filed" by the labor organization. The introduction of evidence on each of these issues would obviously operate to delay and impede the Board's "real function of deciding unfair labor practice cases and determining bargaining representatives" (*ibid.*).

What we have pointed out above has particular application in this case if, as the court below apparently held (*infra*, pp. 49–50), the test for determining the persons subject to the filing requirements is a "functional test", i. e., one depending on "the functions and extent of jurisdiction" of the individual in question. The magnitude and scope of the inquiry which such a test, so lacking in objective standards would involve, scarcely requires elaboration. The impact which it would have on the Board's real function

of deciding cases on their merits is readily apparent. But even under the Board's "constitutional test", which treats as an "officer" every person occupying a position identified in the union's constitution as an office, or occupying a position which the union has omitted from the designation of officers in its constitution for the purpose of evading or circumventing the filing requirements of Section 9 (h), it is clear that to permit litigation of compliance status would likewise lead to serious delay in the resolution of the substantive issues in unfair labor practice and representation proceedings.

Litigation in an unfair labor practice or representation proceeding as to whether a person is an "officer" under the "constitutional test" would, first of all, require the introduction of evidence as to the status of the individual under the union's constitution. Where, as sometimes is the case, the provision in the constitution regarding officers is ambiguous, the ambiguity would have to be resolved by extrinsic evidence. Cf. *Compliance Status of Local 1150, United Electrical, Radio and Machine Workers of America*, 96 N. L. R. B. 1029; *Compliance Status of Furniture Workers, etc., Local 576*, 107 N. L. R. B. 872. Furthermore, if the position, alleged to be an office, is omitted from the constitution, the union's motive in making the omission would become the central issue.

In determining the question of motive the most

obvious motive for the individual's failure to file an affidavit would be his inability to attest to non-membership in the Communist party or freedom from other disqualifications. Thus, as to a person alleged to be a union officer, it would be relevant for an employer, in any hearing on the merits of a representation or unfair labor practice case, to prove, and for a union to disprove, the Communist party membership of the individual in question. It was precisely this type of inquiry which Congress feared would make for endless delays in the resolution of such cases.

As we have shown (*supra*, pp. 20–23), these considerations prompted the enactment of Section 9 (h) in its present form so as to relieve the Board from having to permit litigation of issues of this kind in hearings on the merits. Moreover, if evidence could be adduced as to one individual, the same issue could be raised as to virtually every person performing any duties for the charging union, its international and every other affiliated union (see *infra*, p. 61). Accordingly, the litigation of the identity of union officers, even under the Board's test, would introduce into Board hearings the very mischief which Congress sought to avoid, namely, the investigation, in hearings on the merits, of "the character of all the local and national officers as well as the character of the officers of the parent body or federation" (*supra*, p. 22). Thus it becomes manifest, as the Fifth

Circuit has held in *National Labor Relations Board v. Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873,[1] a case similar to the instant one, that

> * * * Congress did not intend that each of the numerous proceedings instituted by the Board upon complaints of violation of the statute against parties throughout the nation should be delayed and determined on a case-to-case basis with all the attendant opportunities for delay in the functioning of the processes of the Act. We find no authority in the statute supporting the view that * * * completeness of the affidavits may be challenged in a defense to proceedings conducted by the Board * * *.

The litigability of the officer issue under Section 9 (h), however, is but one aspect of a broader problem. Since Sections 9 (f) and (h) are parallel provisions (*supra*, p. 29), if compliance with Section 9 (h) were held litigable, by the same token compliance with Section 9 (f) could likewise be required to be litigated in hearings on the merits. Litigation of compliance with Section 9 (f) could give rise to an even greater range of issues than those arising under Section 9 (h).

[1] Accord: *American Rubber Products Corp. v. National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7). But cf. *Goodman Manufacturing Co. v. National Labor Relations Board*, decided November 10, 1955, where the Seventh Circuit has expressed agreement with the decision below.

To comply with Section 9 (f) a labor organization must file with the Secretary of Labor detailed information including a copy of its constitution and bylaws, and a report showing the name of the union, the address of its principal place of business, the names of its three principal officers, the titles of the offices they hold, the amounts they receive as compensation and allowances, the names of other officers and agents whose compensation and allowances exceed $5,000; the titles of such officers, the manner of selecting all the above officers and agents, the initiation fee for new members, and the regular dues for members. Labor organizations must also report, either separately or by reference to appropriate provisions in their constitution and bylaws, the following: any qualifications and restrictions as to membership; the procedures for election of officers and stewards, calling regular and special meetings, levying assessments and fines, authorization of bargaining demands, ratification of contract terms, authorization for strikes, authorization for spending funds, and audit of union financial transactions; union participation in insurance or benefit plans; and grounds and procedures for expulsion of members. In addition, a labor organization must make a financial report, and supply a copy thereof, to each of its members, showing its total receipts for the past fiscal year, the sources of these receipts, its total assets and liabilities as of the end of the past fiscal year,

disbursements made during the fiscal year and the purpose of such disbursements. Section 9 (g) requires labor organizations annually to file reports with the Secretary of Labor bringing the information previously supplied up to date, and to furnish the financial data to their members.

If litigation as to compliance were permitted in unfair labor practice or representation hearings, employers in such cases could raise an issue with respect to each of the separate items thus required, contending that the union had not filed with the Secretary one or more of the specified pieces of information. Beyond that, since the statute obviously contemplates that true and accurate information shall be filed, employers could contend, and introduce evidence to prove, that any one or more of the items of information supplied was, in one or more particulars, incorrect. For example, employers presumably could contend that the union's statement of assets was grossly inaccurate because excess depreciation was taken, or because reserves set up to meet contingent liabilities were excessive. The broad field of accounting practice, and with it the opportunity of adducing time-consuming expert testimony, would likewise appear to be opened up to employers.

To construe the Act as requiring litigation of such issues in a complaint proceeding would, as the Fourth Circuit pointed out in *National Labor Relations Board* v. *Greensboro Coca Cola Bottling*

Co., 180 F. 2d 840, 845, make the statute "administratively unworkable". The rule that the construction of a statute which would render it unworkable should be avoided if any other construction is reasonably possible has special application here where, as we have shown, Congress itself expressed concern lest the provisions of Sections 9 (f) and (h) be held to operate in such fashion as to impede and delay the "real function of [the Board in] deciding unfair labor practice cases and determining bargaining representatives" (*supra*, pp. 20–23, 24).

D. THE METHOD ADOPTED BY THE BOARD FOR DETERMINING COMPLIANCE STATUS IN A SEPARATE ADMINISTRATIVE PROCEEDING FULLY EFFECTUATES THE PURPOSES OF THE ACT WITHOUT UNNECESSARILY INTERFERING WITH THE DISPOSITION OF REPRESENTATION OR COMPLAINT PROCEEDINGS ON THE MERITS

In order to achieve the objective of Congress to insure compliance by labor organizations with the statutory filing provisions without at the same time unduly hampering the disposition of representation or complaint proceedings on the merits, the Board, as we have seen (*supra*, pp. 5–6), has provided a separate collateral proceeding for the determination of questions relating to a union's compliance status. As noted, before proceeding to investigate questions concerning representation or issuing complaints the Board carefully checks the compliance status of the moving labor organization (*supra*, pp. 16–19). As a practical matter compliance by the labor organization has to be redetermined frequently throughout the Board's

proceedings in view of possible lapses from compliance occasioned by vacancies in union offices and many other circumstances. *National Labor Relations Board v. Dant*, 344 U. S. 375, 383.

To assist it in its investigations, the Board encourages parties to a proceeding to bring to its attention all matters affecting the union's compliance status and provides the parties with pertinent compliance information for this purpose.[11] Furthermore, the Board will entertain motions regarding the compliance status of unions and will consider such information as may be submitted to it in determining whether a situation warrants further investigation.[12] To insure that all of the "officers" of a union have filed the required affidavits the Board requires a union to submit a "certificate of union officers", signed by an "authorized agent", containing the titles of all union offices listed in the constitution and bylaws of the union, the names of the persons occupying those offices, and the dates of the expiration of the terms of office, together with a

[11] See R. 528a; *Sunbeam Corp.*, 94 N. L. R. B. 844; *Aerovox Corp.*, 104 N. L. R. B. 246, enforced, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968. Thus in the present case the Board, upon respondent's request, furnished respondent the names of the officers of the CIO as well as of the charging local, together with a statement that Taylor, the CIO regional director for Kentucky, was not listed as an officer and had not filed a non-Communist affidavit (R. 528a; 274–29a).

[12] *Ibid.* See also *Metropolitan Life Insurance Co.*, 90 N. L. R. B. 935; *Compliance Status of Local No. 1150, U. E. W.*, 96 N. L. R. B. 1029.

copy of the constitution and bylaws against which the list of offices may be checked.[13] The person filing the "certificate of union offices" is liable for criminal prosecution for any willfully false statement made in it,[14] so that the incentive to be accurate and truthful in preparing this affidavit is identical with that which prevails in filing the non-Communist affidavits by the union officers themselves (see App., *infra*, pp. 70–71).

As a further safeguard against evasion, the Board provides that where it "has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing" the filing requirements of Section 9 (h) of the Act, the Board may require affidavits from persons other than those named as officers by the union (*infra*, pp. 48–49). In order to determine possible evasion the Board will conduct an investigation and, upon a proper showing, a hearing in which the issue can be heard and determined.[15]

[13] See *supra*, p. 18; Board's Rules and Regulations, 29 C. F. R. (1955 Supp.) 102.13 (App. *infra*, pp. 70–72).

[14] See 18 U. S. C. 1001; *Craddock-Terry Shoe Corp.*, 76 N. L. R. B. 842, 843; *Marzani* v. *United States*, 168 F. 2d 133, 141–142 (C. A. D. C.); affirmed, 335 U. S. 895.

[15] See R. 528a–529a. See also, Board's *Seventeenth Annual Report* (1952), p. 26; Board's *Nineteenth Annual Report* (1954), pp. 10–11. *Compliance Status of Plaster Tenders, Construction, General and Shipyard Laborers, Local Union No. 802, etc.*, 111 N. L. R. B. 742; *General Shoe Corp.*, 109 N. L. R. B. 618.

The advantage of the separate administrative investigation and hearing procedure is that it operates to keep both the compliance proceeding and the proceeding on the merits within bounds, and avoids a diffusion of the issues in different types of proceedings dealing with entirely unrelated matters. *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6). It also permits the Board to dispose of the compliance question on a union-by-union basis instead of a case-by-case basis. Any determination that a union is out of compliance affects not only the particular case in which the issue is raised but all of the cases on the Board's docket in which the union is a party or affiliate of a party in a Board proceeding. For instance, any determination that the CIO, the union whose compliance was put in issue by respondent, was not in compliance would have affected numerous unfair labor practice and representation cases pending before the Board at the same time as the instant case. Effectuation of Section 9 (f), (g), and (h) of the Act would have required the Board to suspend the proceedings in all of these cases.

Furthermore, the "factual determination of this question [in a separate independent proceeding] will * * * be applicable to all unfair labor practice proceedings in which a particular union is involved with different respondents", thus saving the time and expense in relitigating

the union's compliance status in future cases. *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6). See also, *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873. If need be, the employers in these subsequent cases could utilize the record already developed on the compliance status of the labor organization in the earlier proceeding and seek further consideration of the compliance question in the light of newly offered evidence.

Under all these circumstances it becomes manifest that the separate collateral procedure established by the Board for determining compliance questions appropriately effectuates the Congressional purpose. "[I]n the performance of [its] duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose * * *." *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, 253. The Board "should be free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties" *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143). "No one has a vested right in any given mode of procedure" (*Crane* v. *Hahlo*, 258 U. S. 142, 147), particularly where the party who raises the issue as to the propriety of the Board's established procedure has only a collateral interest in the matter (see *infra*, pp. 44–45).

The legislative history of Sections 9 (f), (g), and (h) establishes that the purpose of these sections was to protect the interest of the employees and the public in the operational and financial responsibility of unions and in freedom from the danger of political strikes. See H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 53; 93 Cong. Rec. 3425, 3629, 3635, A-1911, 5110; Leg. Hist., pp. 344, 616, 789, 800, 869, 1509. See also, *American Communications Association* v. *Douds*, 339 U. S. 382; *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146 (D. D. C.), affirmed, 334 U. S. 854. Nowhere in the legislative history of those sections is there any indication that Congress was in any way concerned in Sections 9 (f), (g), and (h) with conferring any special rights or benefits to employers. The question of the union's compliance does not generally affect the employer's substantive obligations under the Act. As the courts of appeals have uniformly held, Sections 9 (f), (g), and (h) do not in any of themselves minimize or excuse conduct which would otherwise constitute an unfair labor practice.[28] They do not necessarily preclude the Board from proceeding against such conduct upon

[28] See *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 133–134 (C. A. 1), certiorari denied, 346 U. S. 887; *National Labor Relations Board* v. *Pecheur Lozenge Co., Inc.*, 209 F. 2d 393, 402 (C. A. 2), certiorari denied, 347 U. S. 953; *National Labor Relations Board* v. *Tennessee Egg Co.*, 291 F. 2d 370 (C. A. 6), reversing 199

a charge filed by someone other than a noncomplying labor organization.[17] They expressly affect only the availability to the union of the opportunity to initiate proceedings by filing a petition or charge (*supra*, pp. 45-46).

Thus the interest of an employer in the administration of compliance questions under Sections 9 (f), (g), and (h) is but a collateral one. As such, it cannot outweigh the public interest in the orderly administration of the Act which makes it appropriate and desirable that the litigation and determination of such questions be confined to separate administrative proceedings.

E. THE ISSUE IN THIS CASE IS NOT CONTROLLED BY THIS COURT'S DECISION IN THE "HIGHLAND PARK" CASE

The court below, in requiring the Board to permit litigation of the CIO's compliance status,

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F. 2d 95 (C. A. 6); *West Texas Utilities Co., Inc.* v. *National Labor Relations Board*, 164 F. 2d 233, 239 (C. A. D. C.), certiorari denied, 341 U. S. 939.

[17] *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443-444 (C. A. 3), certiorari denied, 342 U. S. 868; *Southern Furniture Mfg. Co.* v. *National Labor Relations Board*, 194 F. 2d 59, 61 (C. A. 5), certiorari denied, 343 U. S. 964; *National Labor Relations Board* v. *L. Ronney & Sons Fur. Mfg. Co.*, 206 F. 2d 730, 732 (C. A. 9), certiorari denied, 346 U. S. 937; *National Labor Relations Board* v. *Coal Creek Co.*, 204 F. 2d 579, 582 (C. A. 10). If, of course, the Board should find that the person filing a charge or petition is "fronting" for a noncomplying union which stands to benefit from a Board order or certification, the Board will dismiss the charge or petition, as the case may be. See, *e. g.*, *Campbell Soup Co.*, 76 N. L. R. B. 950; *Publishers Printing Co., Inc.*, 110 N. L. R. B. 55; *White* v. *Herzog*, 80 F. Supp. 407, 408 (D. D. C.).

rested its decision (R. 541a) upon the decision of this Court in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322. The question posed in that case was whether a parent federation such as the CIO was a national or international labor organization within the meaning of Section 9 (h) and hence subject to the filing requirements. This Court, pointing out that upon the "admitted facts" a naked issue of law was involved, held that the question was litigable in the unfair labor proceeding and open to judicial review. The Court, however, carefully drew a distinction between the necessity of compliance by a labor organization (the CIO) and the fact of compliance (on the part of the CIO), saying (341 U. S. at p. 325):

> If there were dispute as to whether the C. I. O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact.

It is this reserved question which is here presented, namely, whether the Board can determine administratively if "the C. I. O. had filed the required affidavits". Unlike in *Highland Park* the question here is not whether the CIO is required to file the non-Communist affidavits in order to avail itself of the Board's processes but

rather whether the CIO has in fact satisfied the filing requirements of Section 9 (h).

Respondent asserts that the compliance status of the CIO is defective because one of its regional directors, Taylor, although not designated by the union as one of its officers, nevertheless, in fact, exercised functions which required his designation as an "officer" within the meaning of Section 9 (h) and therefore should have filed the required affidavit. The determination of this question under the test urged by respondent and approved by the court below turns upon the duties and functions which Taylor performed and the "influence" he may have exerted in the union's affairs. Under the "constitutional test" adopted by the Board (*supra*, pp. 7, 14), the determination of Taylor's status as an officer turns on whether the union has designated Taylor's position as an office in its constitution and, if not, whether the union has acted in bad faith in omitting that position from its constitution in order to circumvent the filing requirements. In either case the dispute here is, essentially, "whether the C. I. O. had filed the required affidavits" (*Highland Park, supra*).

Accordingly, the question posed in this case is entirely different from that raised and decided in *Highland Park*, for here the employer seeks to question only the *fact* of compliance, as distinguished from the *necessity* of compliance, which was the issue in *Highland Park*. As the court

below itself pointed out in *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650, which dealt with the question of the litigability of compliance questions in a related context, the *Highland Park* case has "not answered" the "question of where or how the issue of compliance [is to be] raised".[18]

II

THE BOARD'S CONSTRUCTION OF THE TERM "OFFICER" IN SECTION 9 (H) TO MEAN A PERSON OCCUPYING A POSITION IDENTIFIED AS AN OFFICE IN A UNION'S CONSTITUTION OR BYLAWS IS REASONABLE AND PROPER

Neither Section 9 (h) nor any other provision of the Act defines the term "officer". In August 1947 the Board issued an interpretation, construing the term "officer", for purposes of the filing requirements of that section, to "include all persons described as 'officers' in the International, National, and/or local constitutions and by-laws" of the union.[19] Subsequently the Board adopted

[18] See *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7). But cf. *Goodman Manufacturing Co.* v. *National Labor Relations Board*, *supra*, p. 36, fn. 10.

[19] The interpretation was adopted contemporaneously with the effective date of the 1947 amendments in instructions from the General Counsel to all personnel responsible for handling compliance. The interpretation was publicized in *A Guide for Labor Organizations* distributed to labor organizations (*supra*, p. 17, fn. 5) and in Daily Labor Report, August 19, 1947, No. 162, p. A–1.

the practice of requiring non-Communist affidavits from persons other than those designated as officers in the union's constitution, "where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements".[20]

The court below rejected the Board's "constitutional test" for determining the meaning of the term "officer" in Section 9 (h) and adopted instead what might be characterized as a "functional test". Under this test, the question whether a person is an "officer" of a labor organization turns on his duties, functions, and responsibilities irrespective of his office or position in the labor organization.[21] Respondent apparently urges an even broader test so as to include "all union executives" and agents whose "posi-

[20] This practice, along with the original interpretation of the meaning of the term "officer", was embodied in Rule 102.13 (b) of the Board's Rules and Regulations, Series 6, promulgated November 29, 1949 (App., *infra*, pp. 71–72). See also Board's *Fifteenth Annual Report* (1950), p. 20.

[21] The court below did not attempt to define the scope of its "functional test" (R. 541a). After reciting respondent's offer at the hearing before the Board to show that Taylor, the CIO regional director for Kentucky, exercised "administrative and executive powers" over the local and a "working control over" other unions in Kentucky, the court remanded the case to permit respondent to introduce testimony "as to the functions and extent of jurisdiction" of Taylor (*ibid.*).

tion of leadership and influence give[s] them an important role in labor relations".[22]

We submit that the Board's definition of the term "officer" is reasonable, accords with the usual and ordinary meaning of the term, and is fully consistent with the objectives of the Act. In any event, neither the commonly accepted meaning of the term "officer" nor the legislative history of Section 9 (h) compels the broad construction given to the term by the court below or urged by respondent.

A. THE BOARD'S DEFINITION OF THE TERM "OFFICER" REFLECTS THE USUAL AND ORDINARY MEANING OF THE TERM

Since Section 9 (h) does not define the term "officer", Congress must be presumed to have used the word in its usual and ordinary sense. *United States* v. *Stewart*, 311 U. S. 60, 63. "[L]egislation, when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a

[22] See respondent's brief in opposition to the Board's petition for certiorari, pp. 16–17.

The Seventh Circuit in its recent decision in *Goodman Manufacturing Co.* v. *National Labor Relations Board*, decided November 10, 1955, has also held that the determinative factor is not whether the position in question is listed as an "office" in the union's constitution. In its view, the term "officer" includes "those who hold positions of responsibility and trust which, in the labor organization's own view, are of sufficient importance to be established by its constitution".

right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618; *Helvering* v. *Hutchings*, 312 U. S. 393, 396.

The basic structure of labor organizations, as well as that of other organizations is, of course, established by the constitution, charter or bylaws of the organization. These instruments create the offices of the organization and determine the duties attached to each office, the role of the officers in the organizational set-up, and their relationship and connections with the different units in the organization, including the executive board. For example, the constitution of the CIO establishes the following officers: president, executive vice president, secretary-treasurer, and eight vice presidents (*supra*, p. 8, fn. 2). Among other things, the president "exercises supervision of the affairs" of the union and has authority, subject to executive board approval, "to appoint, direct, suspend or remove, such organizers, representatives, agents and employees as he may deem necessary". (Article V of the CIO Constitution.) The vice presidents act as assistants to the president and "carry out such special assignments" as are required by the president (*ibid.*). One of these special assignments, entrusted to the executive vice president, is the direction of the Organizational Department, which in turn supervises the regional directors such as W. B. Taylor, the individual in this case claimed to be an officer (*supra*, p. 8, fn. 2).

The positions designated as offices in the constitutions of labor organizations of course vary from union to union, as do the number of offices established and the duties assigned to each office. "The duties and responsibilities of offices are defined, not by logic, but by constitutional provisions and laws."[23] However, the individuals elected officers are normally regarded as "the men with the greatest personal influence in the union. * * * These are the men who administer the policies of the union. The knowledge and power which the officers get as administrators of policies enhances their influence as policy-makers."[24]

Literature in the field of labor relations, as well as the organic instruments of the labor organizations, emphasize the distinction between "officers" and other union executives or agents. For instance, one authority in discussing the different functions of the executive board and of the officers of the CIO states:

> The C. I. O. executive board is large. However, as pointed out * * * there is a separate set of officers as well. These of-

[23] Miller & Form, *Industrial Sociology* (Harper & Brothers, 1951), p. 238.

[24] Slichter, *The Challenge of Industrial Relations: Trade Unions, Management and the Public Interest* (Cornell University Press, 1947), pp. 104–105. See also, Peterson, *Survey of Labor Economics* (Harper & Brothers, 1951), p. 521; Lester, *Labor and Industrial Relations* (Macmillan Co., 1951), pp. 129–130.

> ficers are included in the board, but they constitute a separate and very influential governing body in themselves.[25]

Another source illustrates the distinction between the conventional officers of a labor organization and other executive officials as follows:

> In the usual international union, you find at the top a president and a secretary-treasurer; these are the two top-status, full time positions. In addition, there are a number of vice presidents * * * in charge of the organizing activities. * * * In addition to these positions there is also one executive board which usually consists of the president, secretary-treasurer, and vice presidents, but which in some unions also includes additional persons who are elected.[26]

The distinction between "officers" and other union agents such as organizers, business agents, international representatives, field representatives, stewards, etc., is also illustrated by the usual characterization of these agents as "staff employees" and, not infrequently, as the "noncoms of the union."[27]

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[25] Clyde E. Dankert, *Contemporary Unionism in the United States* (Prentice-Hall, Inc., 1948), p. 115.

[26] Gardner and Moore, *Human Relations in Industry* (Richard D. Irwin Inc., 1950), pp. 142–143.

[27] Sayles and Strauss, *The Local Union: Its Place in the Industrial Plant* (Harper & Brothers, 1953), pp. 10–11; Peterson, *International Unions*, in Bakke and Clark, *Unions*,

The distinction thus recognized between officers on the one hand and executive, administrative, and other agents, prevails in other fields as well. As to corporations, for instance, it is undisputed that an officer "is created by the charter of the corporation". *Vardeman* v. *Penn. Mut. Life Ins. Co.*, 125 Ga. 117, 119, 54 S. E. 66, 67. In that case the court set forth the generally accepted distinction between "officers" and agents in the following oft-repeated language (*ibid.*):

> One distinction between officers and agents of a corporation lies in the manner of their creation. An officer is created by the charter of the corporation, and the officer is elected by the directors or the stockholders. An agency is usually created by the officers, or one or more of them, and the agent is appointed by the same authority. It is clear that the two terms, officers and agents, are by no means interchangeable. One, deriving its existence from the other, and being dependent upon that other for its continuation, is necessarily restricted in its powers and duties, and such powers and duties are not necessarily the same as those pertaining to the authority creating it. The officers, as such, are the corporation. An agent is an employe. "A mere employment, however liberally compensated, does

Management and the Public (Harcourt, Brace & Co., 1948), p. 174; Peterson, *Survey of Labor Economics* (Harper & Brothers, 1951), pp. 522-523; Miller & Form, *Industrial Sociology* (Harper & Brothers, 1951), p. 246.

not rise to the dignity of an office." 21 Am. & Eng. Enc. Law (2d ed.) 836.

Thus the Board's construction of the term "officer" in Section 9 (h) reflects the usual and ordinary meaning of the term as well as the one commonly accepted in the field of labor relations.

B. THE LEGISLATIVE HISTORY OF SECTION 9 (H) DOES NOT REQUIRE THE BROAD CONSTRUCTION GIVEN TO THE TERM "OFFICER" BY THE COURT BELOW OR URGED BY RESPONDENT

Neither in the Committee Reports, nor in the course of debate, did the sponsors of the 1947 amendments deal explicitly with the meaning of the term "officer" in Section 9 (h). The proponents and opponents of the legislation who spoke on the original House bill (*supra*, pp. 21–22) and on subsequent amendments used the term "officer" without elaboration.[28] Occasionally, they used the term "officers" and "leaders" interchangeably.[29] If any significance at all can be attached to Congressional comment, however, the language would tend to indicate that the proponents of the legislation understood the meaning of the term "officer" to apply to high elective union office.

Thus, Senator McClellan, in introducing an amendment to the Senate bill embodying the features of the original House bill (H. R. 3020), which would have denied Board certification to

[28] See 93 Cong. Rec. 3424, 3519, 3528, 6283, A-1035, 4880; Leg. Hist., pp. 643, 677, 694, 874, 993, 1410.

[29] See 93 Cong. Rec. 3627, 6382-6383; Leg. Hist., pp. 786, 884.

unions whose "officers" were members of the Communist Party or held other proscribed membership, affiliation or belief (*supra*, p. 21), stated that the purpose of the amendment was to prohibit certification of unions "headed by a communist" (93 Cong. Rec. 4895; Leg. Hist., p. 1436). Senator Wiley, another proponent of the legislation, in a statement incorporated into the Congressional Record explaining the need for eradicating Communist leadership from the labor movement, stated: "Labor * * * must not cast ballots for union officers who are America-breaking * * * (93 Cong. Rec. A–1035; Leg. Hist., p. 993). And Senator Taft, in a public address, also incorporated in the Record, wherein he opposed the presidential veto of the bill which became the amended Act, asked in a rhetorical vein, "why shouldn't every labor union make Communists ineligible for election as officers" (93 Cong. Rec. A–3044; Leg. Hist., pp. 1627, 1628).

However, even if the legislative history of Section 9 (h) prior to its adoption may not be regarded as especially illuminating, the difference in language used by Congress in Section 9 (f), in enumerating the persons concerning whom information and reports must be filed, is significant. Thus in order to effect compliance with Section 9 (f), Congress provided that the labor organization shall file with the Secretary of Labor, among other things:

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other *officers or agents* whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such *officer or agent* during such year;

(3) the manner in which the *officers and agents* referred to in clause (2) were elected, appointed, or otherwise selected;

* * * * *

(6) a detailed statement of, or reference to provisions of its constitution and by-laws showing the procedure followed with respect to * * * (b) election of *officers and stewards*, * * *. [Emphasis added].

It is evident that when Congress desired operational and financial information concerning "agents" or "stewards" irrespective of their status as "officers," it specifically said so. If it had sought to require non-Communist affidavits from these same union officials it had a simple way to express that purpose. However, Congress used no such broad terms as "agents" or "stewards" in Section 9 (h). The use of different words in two related sections, simultaneously enacted, furnishes "strong reasons for supposing that so striking a change in expression could only have proceeded from a deliberate difference of

'intent". Judge Learned Hand in *Securities and Exchange Commission* v. *Robert Collier & Co.*, 76 F. 2d 939 (C. A. 2). See also *Crawford* v. *Burke*, 195 U. S. 176, 190. Cf. *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 385.

The legislative history of various proposed amendments offered in Congress since the passage of the Taft-Hartley Act lends additional support to the Board's "constitutional test". Thus, when in 1949 the Senate considered a bill (S. 249, 81st Cong., 1st Sess.), which would have made substantial changes in the present statute, an amendment was offered which would have defined the term "officer" in Section 9 (h) to cover "members of all policy forming and governing bodies of the labor organization as well as those designated as such by the constitution of the labor organization".[30] A corresponding provision applicable to employers provided for filing of non-Communist affidavits by "its officers if it is a corporation and each of such employer's agents having responsibility for the employer's labor relations". The amendment was passed by the Senate but never acted upon by the House. So far as we are aware, this proposal and others of similar nature referred to below were prompted not by any disagreement with the

[30] The amendment was offered by Senator Taft in behalf of the minority members of the Senate Committee on Labor and Public Welfare, 95 Cong. Rec. 5589; S. Rep. No. 99, Part 2, 81st Cong., 1st Sess., pp. 45–48, 51–52.

Board's construction of the term "officer" in the present section but by a desire to enlarge the statutory coverage. There is no evidence of any criticism of the Board's construction either in any committee reports or in discussion of the amendments on the floor. Indeed, Senator Douglas, in proposing an amendment dealing with the matter,[31] did not disagree with the Board's construction of the term "officer", but stated that his proposal "is more vigorous than is the provision in the Taft-Hartley law".[32]

Similar proposals were introduced in 1953 by Senator Taft (S. 655, 83d Cong., 1st Sess.) and by Senator Martin in 1954 (S. 2650, 83d Cong., 2d Sess.), neither of which was adopted. These proposals, like the ones already mentioned, are significant in that they establish: (1) That "it would have been a simple matter" for Congress to have expressed an intention to cover adminis-

[31] Under Senator Douglas' proposal the term "officer" would have meant "those persons designated as officers by the constitution and bylaws and members of all executive policy-forming and governing bodies of an employer and any local. * * *" This definition, proposed as an amendment to S. 249, although adopted by the Senate was not acted upon by the House. 95 Cong. Rec. 7720, 7791, 7796.

[32] The Joint Committee (*supra*, pp. 23–24) in its Report to Congress on December 31, 1948, 80 Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 3, indicated satisfaction with the results of the operation of Section 9 (h), stating: "Elimination of Communist partisans and adherents from official posts and positions of responsibility in both national and local unions is one of the most pronounced and significant effects of the Labor Management Relations Act, 1947."

trative officials and other agents if Congress had so intended (Cf. *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 379); (2) that the reading of the present Section 9 (h) by the proponents of the post. Taft-Hartley amendments accords with that given to the section by the Board; and (3) that the proponents of these amendments recognized that substantial alteration in the language of Section 9 (h) was necessary to give to the section a meaning such as that urged by respondent or adopted by the court below.

C. THE BOARD'S CONSTRUCTION OF THE TERM "OFFICER" IS REASONABLY DESIGNED TO EFFECTUATE THE BASIC PURPOSES OF THE ACT

Section 9 (h) was adopted by Congress to weed out Communists from positions of leadership in labor unions. "By exerting pressures on unions to deny office to Communists and others identified therein, Section 9 (h) undoubtedly lessens the threat to interstate commerce * * *." *American Communications Association* v. *Douds*, 339 U. S. 382, 393. Weighing the evil which it sought to remedy against the practical administration of Section 9 (h), Congress apparently concluded that the eradication of Communist influence from the most prominent positions of labor organizations would extirpate the main possibilities of Communist control.

As we have seen (*supra*, pp. 52–53), the persons designated as officers in the constitutions of

labor organizations are generally regarded as "the men with the greatest personal influence in the union." They usually constitute a substantial portion of the union's executive board, are responsible for the appointment and discharge of subordinates, and control the overall supervision and direction of the every-day operations of the organization. Under the Board's "officer test" all of these officials are required to file non-Communist affidavits. To insure against "even the possibility" of evasion (Board's *Fourteenth Annual Report* (1949), p. 16), the Board will scrutinize the constitution and the practices of unions and will conduct extensive administrative investigations and hearings for the purpose of determining fraudulent omissions from the list of office (*supra*, pp. 17–18).

Congress could have, of course, extended the coverage of Section 9 (h) to all "influential" agents generally, whether or not denoted "officers" in union constitutions, such as international representatives, organizers, regional directors, managers, coordinators, stewards, committeemen, etc. It cannot be gainsaid that these officials perform important administrative and executive functions and may play influential roles in the union hierarchy. Nor can it be denied that Communists may infiltrate and wield considerable

[19] Of course, if any of these officials are in fact designated officers in a particular union's constitution they are required to file non-Communist affidavits.

influence in a union, even though they may occupy positions below the rank of officers. Congress could have barred unions from access to the Board's process whenever any member was a Communist and, irrespective of his position in the union, exercised substantial direction and control over the union's officers.[34] It could also have provided other specific penalties for noncomplying unions, in addition to denial of access to Board processes. It could have for example denied statutory protection to employees who were members of noncomplying unions, or it could have made it unlawful for employers to recognize and bargain with such unions. While such measures might well have constituted even more effective means for the eradication of Communists from labor unions, Congress did not see fit to adopt such methods in the Act. (See cases cited *supra*, p. 44, fn. 16.) "How to curb an evil, what remedies will be effective; the reach of a particular evil and * * * the appropriate scope of a remedy against it—all these are in the main matters of legislative policy not open to judicial condemnation." *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 419 (concurring opinion of Mr. Justice Frankfurter).

Congress in Section 9 (h) appears to have purposefully drawn the line where it did. Congress apparently weighed the mischief it sought

[34] See fn. 36, *infra*, p. 64.

to correct with the feasibility of administering the section. Ascertainment of the identity of "influential" agents necessarily poses serious problems of administration. Appropriate in the consideration of such question is not only the title of the position or the ostensible duties attaching thereto but the extent of the agent's influence in the union, the weight accorded his views and a host of intangible factors. Moreover, the extent of control and influence of a particular individual in a particular union is by no means a constant factor.[35]

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[35] Miller and Form, *Industrial Sociology* (Harper & Brothers, 1951), pp. 246, 250: "For one thing, power, authority, and jurisdiction in democratic organizations are often poorly defined. * * * The fact that the union deals with emergencies means that officials must have power to act quickly. Different officials must have power at different times. The grievance committee or executive board may occupy the focus of attention during some periods. Its members must have almost independent power during bargaining sessions. In another situation, the business agent or international representative must have power. * * * Ideally the role of each important union official should be examined separately. Owing to the diversity of local structures, this is difficult to do."

Ginzberg, *The Labor Leader* (Macmillan Co., 1948), p. 41: "If a leader be one who influences the thoughts and actions of others, the number of labor leader is legion. So broad a definition is not useful. * * * Concentrating on the executive board has its dangers. Some men doubtless succeed in being elected to the executive boards of their unions even though they do not possess the hallmarks of true leadership. Accident or politics catapults them into prominent posts. And the reverse is also true; in almost every union a few powerful leaders do not become members of the executive board."

The difficulties inherent in the administration of a "leadership" or "influential role" test may well have prompted Congress to draw the line at "officers" in the sense that the term is generally understood. The ascertainment of the "influential persons" in a given union without regard to any objective standards would seriously hamper the administration of the Act. Since the Board is precluded from proceeding on petitions and charges filed by noncomplying unions, it would be incumbent on the Board to determine in each case, where the issue was sought to be raised, the role played by all of the officials of the charging union and its affiliates in whatever capacities employed. The process would have to be repeated at various stages of the proceedings to make sure that the union's compliance is up-to-date (*supra*, pp. 18–19). The difficulties in administering the Act would be aggravated if the Board's determination of these matters were subject to litigation in the representation or complaint proceeding. In these circumstances, it cannot reasonably be said that the Board's constitutional test is in any way at odds with the Congressional purpose.[20]

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[20] Cf. the Communist Control Act of 1954, 68 Stat. 775, 777, 778, Sections 7 and 10 amending the Subversive Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781, *et seq.* This Act, which withdraws from "Communist-infiltrated" organizations certain benefits conferred upon labor organizations by the National Labor Relations Act, defines the term "Communist-infiltrated" to include substantial direction or control "by an individual" or group of "individuals", irrespective of the

D. THE BOARD'S CONSTRUCTION OF THE TERM "OFFICER" IN SECTION 9 (h), MADE CONTEMPORANEOUSLY WITH THE ENACTMENT OF THE SECTION BY THE AGENCY RESPONSIBLE FOR ITS IMPLEMENTATION AND ADMINISTRATION, SHOULD BE JUDICIALLY APPROVED UNLESS PLAINLY ERRONEOUS.

Since Section 9 (h) does not specifically define the term "officer", it is reasonable to assume that "[t]hat task has been assigned primarily to the agency created by Congress to administer the Act". *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130. The Board adopted its interpretation of the term contemporaneously with the effective date of the section (*supra*, p. 48) as part of the many rulings and implementations which were essential to efficient functioning and administration of the section. The Board's interpretation is thus entitled to "peculiar weight [for] it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new". *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. Moreover, "[t]o sustain the [Board's] application of this statutory term [the Court] need not find that its construction is the only reasonable one, or even that it is the

individual's position in the organization. It is noteworthy that although the sanctions provided concern loss of rights under the National Labor Relations Act, Congress delegated the extensive fact-findings and hearings not to the Board but to a specially created agency.

result [the Court] would have reached had the question arisen in the first instance in judicial proceedings". *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 153–154. The test on review is "reasonableness and not rightness". Davis, K. C., *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 559, 572. Accord: *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402, 412–413; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals.

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NOVEMBER 1955.

APPENDIX

STATUTE AND RULE INVOLVED

A. *Provisions of Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h).*

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded

$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the finan-

cial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a mem-

ber of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

B. *Provisions of Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. (1955 Supp.) 102.13.*

§ 102.13. *Compliance with section 9 (f), (g), and (h) of the act.* (a) For the purpose of the rules and regulations in this part, compliance with section 9 (f) and (g) of the act means (1) that the Secretary of Labor has issued to the labor organization, pursuant to the rules of the Department of Labor, a letter showing that the labor organization has filed the material required under section 9 (f) and (g) of the act; (2) that the labor organization has filed with the general counsel in Washington, D. C., or with the regional director, either as part of the charge (or petition) or otherwise, the duplicate copy of such compliance letter; and (3) that the labor organization has filed with the general counsel or with the regional director for the region in which the proceeding is pending or in which it customarily files cases, either as part of the charge (or petition) or otherwise, a declaration executed by an authorized agent stating that the labor organization has complied with section 9 (f) (B) (2) of the act requiring that it furnish to all of its members copies of the financial report filed with the Department of Labor, and setting forth the method by which such compliance was made.

(b) For the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization, except,

however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.

U. S. GOVERNMENT PRINTING OFFICE: 1959

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 79.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

versus

COCA-COLA BOTTLING CO. of LOUISVILLE, INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 79

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the petition of the Solicitor General on behalf of the National Labor Relations Board that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 15, 1955, which remanded the case to the Board with instructions to conduct further proceedings, be denied.

The Respondent accepts, pursuant to Rule 40(3) of United States Supreme Court, the presentment in Petitioners' Brief of Orders and Opinions below; Jurisdiction; and Statement of the Case.

STATUTE AND RULE INVOLVED.

The text of Section 9(h) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 159(h), which is set out in Petitioner's brief (p. 2), has been amended by P. L. 189, 82d Cong., 1st Sess., 65 Stat. 601. Section 9(h), as so amended, is set forth below. The amendment deletes the language which is enclosed in brackets:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, [no petition under Section 9(c)(1) shall be entertained,] and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Gov-

crimment by force or by any illegal or unconstitutional methods. The provisions of Section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Section 102.13(b) of the Board's Rules and Regulations, also included here, is set out in Appendix B *infra* (p. 23).

QUESTIONS PRESENTED.

1. Whether the Respondent Employer may challenge in an unfair labor practice proceeding the determination of the National Labor Relations Board that a union is in compliance with Section 9(h) of the National Labor Relations Act when that determination is based on an alleged erroneous construction of the statute.

2. Whether the application in this case of the Board's "constitutional" test for determining who are officers required to file non-Communist affidavits under Section 9(h) of the National Labor Relations Act is erroneous.

Respondent contends both these questions should be answered in the affirmative.

ARGUMENT

The issue which is before the Court on this petition for a writ of certiorari arises from an unfair labor practice proceeding in the course of which respondent questioned the Union's compliance with the non-Communist affidavit requirement of Section 9(h) of the National Labor Relations Act. This section provides, among other things, that no complaint shall be issued pursuant to a charge of unfair labor practice unless each officer of the labor organization seeking to invoke the machinery of the Act, and each officer of any national or international labor organization with which it is affiliated shall have filed with the Board an affidavit stating that he is not a member of the Communist Party or supports any organization that believes in or teaches the overthrow of the Government by force or illegal methods.

The record discloses that one W. B. Taylor, Regional Director in Kentucky of the Congress of Industrial Organizations with which the charging Union in this case is affiliated, failed and refused to file a non-Communist affidavit pursuant to Section 9(h) of the Act. It is the contention of Respondent that this fact placed the Union in non-compliance with the Act and that this issue may properly be raised by the company in an unfair labor practice proceeding.

In hearings before the Trial Examiner the Respondent offered to show that Mr. Taylor occupied so important a position of responsibility and authority in the affairs of the C. I. O. that he was able to exercise

decisive influence on the C. I. O. unions operating in Kentucky and in labor relations there. Respondent's view was that one holding such an important executive post must be considered to be an "officer" of the C. I. O. within the meaning of the filing requirements of Section 9(h) of the National Labor Relations Act, and therefore must file a non-Communist affidavit regardless of the fact that the particular position held by Taylor was not listed as an office in the C. I. O. constitution, which was the Board's test for requiring the affidavit.

The Trial Examiner rejected the Respondent's offer of proof on the ground that the Board, prior to the hearing, had determined that the Union was in compliance with the Act. Questions of the compliance status of a union, the Trial Examiner said, were for the administrative determination of the Board and were not litigable by the parties in an unfair labor practice proceeding (R. 516a, 517a). Thereafter, the Board affirmed the Trial Examiner's ruling for the reasons which he had set forth (R. 528a, 529a).

The Board reached its administrative determination that the Union was in compliance, even though Regional Director Taylor had not filed the non-Communist affidavit, by application of Section 102.13(b) (3) of the Board's Rules and Regulations which defines "officer" as follows: "The term 'officer' . . . shall mean any person occupying a position identified as an office in the constitution of the labor organization. . . ." Under this so-called "constitutional" test Mr.

[1] The full text of Section 102.13(b) is set out in Appendix B to this brief.

Taylor was not classified as an officer because his executive post was not denominated an "office" in the C. I. O. constitution.

Respondent here asserts, and the Court below has held, (a) the Board's interpretation of the meaning of the term "officers" in Section 9(h) of the Act is subject to judicial review, and (b) the Board's "constitutional" test for defining "officers" is inconsistent with the intent of Congress in enacting Section 9(h).

The Decision of This Court in *N. L. R. B. v. Highland Park Manufacturing Company* Establishes the Right of the Respondent to Challenge in an Unfair Labor Practice Proceeding the Determination of the Board That a Union Is in Compliance With the Statute When That Determination Is Based on an Alleged Erroneous Construction of the Statute.

The right of the employer to challenge the compliance of the charging union when the question of compliance involves an issue of the construction of Section 9(h) of the National Labor Relations Act has

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"Respondent's objection to the Board's determination of compliance thus only goes to the "constitutional" test which was the sole basis for that determination. Respondent does not urge that the Board may not bind the parties to an unfair labor practice proceeding by its determination of factual issues in regard to the compliance status of unions. It would be a different case if the Board had adopted a finding such as the following: "Upon prior investigation of the duties and functions exercised by Regional Director Taylor, we have concluded that in fact his influence in union affairs and labor relations is too insignificant and unimportant for him to be considered an officer within the meaning of Section 9(h)." But in effect the Board here has said: "Under our "constitutional" test, Mr. Taylor is not, as a matter of law, to be considered an officer because his position is not denominated an office in the C. I. O. constitution, regardless of what control he exercises over the C. I. O. affiliates and in labor management relations."

been established authoritatively by this Court in *N. L. R. B. v. Highland Park Manufacturing Co.*, 341 U. S. 322 (1951). In that case the Textile Workers Union charged the employer with an unfair labor practice; and in the proceeding thereby initiated, it developed that officers of the C. I. O., with which the charging union was affiliated, had not filed the non-Communist affidavits. The employer, in raising the compliance issue, relied on the language of the Act which provided that no complaint could be issued by the Board pursuant to a charge made by a labor organization unless there were on file with the Board non-Communist affidavits executed by each officer of any national or international labor organization of which the charging union was an affiliate or constituent unit.

The Board had held that the C. I. O. was not a "national or international labor organization" as the words were used in the Act, and hence that the C. I. O. officers were not required to file affidavits before the Board could issue the complaint. Thus the question in the *Highland Park* case was the definition of "national or international labor organization" and the Board's determination of compliance with the statute based on its definition of that phrase. In this case, the question is the definition of "officers" in Section 9(h) and the Board's determination of compliance founded upon its interpretation of the term "officers."

The Board also argued in the *Highland Park* case, as it does here, that its administrative determination that the union was in compliance (which determination was based on the Board's view of the proper construc-

tion of Section 9(h)) was not subject to challenge by the employer in an unfair labor practice proceeding.

This Court held that the Board had wrongly interpreted the statute and that the employer was correct in maintaining that the C. I. O. was a "national or international" union whose officers must file affidavits. It also specifically rejected the Board's contention that its administrative determination of compliance could not be contested. The opinion held that when the Board's determination of compliance involved an issue of law, as distinguished from questions of fact, the employer was not precluded from challenging in an unfair labor practice proceeding the compliance status of the union. Mr. Justice Jackson stated:

> "We think the [Board's] contention [that its administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding] is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U. S. at 325, 326.

We respectfully submit that the instant case is indistinguishable from the *Highland Park* decision in the respect that both cases present the same issue of whether the employer may challenge the Board's determination that the union was in compliance on a point of law, namely, the construction of Section 9(h)

applied by the Board in making that determination. In neither case did any dispute over the facts arise. It was not denied in the *Highland Park* decision that the C. I. O. Officers had not filed affidavits; nor here that Regional Director Taylor had not filed. In both cases the simple issues relate to (a) whether the statute should be construed so that the persons involved would be brought within the affidavit filing requirement of the Act and (b) whether an employer could question the Board's determination that the statute did not require such persons to file affidavits. The *Highland Park* decision ruled in favor of the employer on both issues and, we submit, its holding must be controlling here.

Since this Court in that case has already given a clear negative answer to the Board's contention that the employer is precluded from questioning the compliance status of a union when the issue is the construction of Section 9(h) upon which the Board's determination of compliance is bottomed, it is submitted that no grounds for granting the writ of certiorari on this basis are available to the petitioner.

The petitioner, in seeking to distinguish the *Highland Park* decision from the case presented here (Petitioner's Brief, p. 12), mistakenly argues that a question of fact is present here and relies on the following language of the *Highland Park* opinion:

> "If there were a dispute as to whether the C. I. O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor

of the labor organizations, a different question would be presented. But here there is no question of fact." 341 U. S. at 325.

But this language does not help the Petitioner. Mr. Justice Jackson here was giving two examples of questions of the "fact of compliance" which he suggested might be held to be a matter for the Board's exclusive determination: (1) a dispute whether affidavits had or had not been filed, or (2) a dispute whether the affidavits on file were sufficient in form and content.

Respondent is unable to see that anything like the problems indicated in these examples is involved here. No one denies that Mr. Taylor had not filed an affidavit. The question is whether the statute makes it necessary for one in his position to file an affidavit. The Respondent does not urge that any of the C. I. O. affidavits which are on file are deficient in form or are otherwise unsatisfactory, but only that Taylor must file an affidavit for there to be compliance.

No Conflict Among the Circuit Courts of Appeals Exists Relating to the Question Here Presented.

The Board in its brief (p. 11) argues that two Circuit Courts of Appeals have decided the question here presented differently than the Court below. But a careful analysis of the two cases cited by Petitioner clearly indicates that neither conflict with the decision of the Court below for the reason that both cases decided only that an employer may not litigate questions of *fact* in regard to the compliance status of the union.

In *N. L. R. B.* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369 (5th Cir. 1954), certiorari denied, 348 U. S. 873, (1954), the Court held that the truthfulness or completeness of the non-Communist affidavits may not be litigated in an unfair labor practice proceeding. Since Respondent did not urge that any of the union affidavits on file were false or insufficient, or any other issue of fact, the problem of the *Vulcan Furniture* case does not here arise.[3]

In *American Rubber Products Corp.* v. *N. L. R. B.*, 214 F. 2d 47 (7th Cir. 1954), the issue was whether one Sheehan, a union representative, who had not filed an affidavit, was an officer or a *de facto* officer of the union. The Court noted that the Board had found upon an independent investigation that Sheehan was not an officer, either *de facto* or otherwise; and the Court held that the employer could not challenge this administrative determination of a *question of fact* in an unfair labor practice proceeding. No issue of the proper definition of "officer" in Section 9(h) was before the Court. The essential difference here is that Respondent does challenge the Board's determination of law that Regional Director Taylor could not be an

[3]The courts clearly distinguish between the right of the employer to object to the Board's detemination of compliance when the challenge raises issues of fact as in the *Vulcan Furniture* case, and the right of the employer to contest the Board's construction of the statute upon which the Board bases its determination of compliance. Judicial treatment of these two distinct problems is essentially different as appears from a comparison of the decision of the Sixth Circuit Court of Appeals in *N. L. R. B.* v. *Louisville Container Corp.*, 209 F. 2d 654 (1954), which raised the same problem as that in the *Vulcan Furniture* case, and that Court's decision in this case. In the *Louisville Container* case the same judges who sat on this case below decided in a *per curiam* opinion that the verity of affidavits was not litigable in unfair labor practice proceedings.

officer required to file an affidavit because his post is not entitled an office in the C. I. O. constitution.[4]

Expedition in the Administration of the Act Is Not Sacrificed by the Rule Contended for by the Respondent.

The Board urges that litigation of the question of the compliance of the union with Section 9(h) in the manner here contended for would seriously impede the resolution of the unfair labor practice charges (Petitioner's brief, pp. 12-15).[5] Actually it does not

[4]The Board also cites (Petitioner's brief, p. 12) the Sixth Circuit's decision in *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645 (1954), with the *Vulcan Furniture* and *American Rubber Products* cases. In the *Sharples Chemicals* case the employer argued that the Board must make a showing on the record as to whether or not the charging union is in compliance before the Board may proceed to resolve the unfair labor practice charge. The court, in rejecting the employer's argument, merely decided that the Board did not have to prove affirmatively in the unfair labor practice proceeding that the union had in fact filed affidavits. Obviously the problem in the *Sharples Chemicals* case is different than the issue in this case of the definition of "officers" which the Board applies in making its determination that a union is in compliance. And the Sixth Circuit has recognized this difference since it decided against the employer in the *Sharples Chemicals* case and for Respondent here.

[5]The Board (Petitioner's brief, p. 13, fn. 5) cites from the legislative history of Section 9(h) certain statements made by Senator Taft while that provision was in the process of passage to support its argument about the need to avoid delay in the hearing of unfair labor practice charges. These remarks of Senator Taft which appear at 93 Cong. Rec. 6444, 6447, 6860 (Legislative History of the Labor Management Relations Act, 1947, pp. 1542, 1547, 1625) are inconclusive so far as the particular problem presented here is concerned. They were directed to explaining a change made in the mechanics of Section 9(h) while the bills which became the Taft-Hartley Act were under the consideration of Congress. In earlier versions of Sections 9(h) it was provided that a union could not be certified as a representative of employees if its officers were Communists. While the anti-Communist provision of the statute stood in this form, it was felt that the question of whether the union officers were Communists would have to be litigated in each case

(Footnote continued on following page)

seem that the Trial Examiner would have appreciably slowed down the determination of this case by allowing the Respondent to present his evidence on the important and influential role which Regional Director Taylor plays in labor affairs in Kentucky. In view of the fact that nearly three years elapsed from the filing of charges to the entry of the Board's order and that the hearing before the Trial Examiner continued for a month, it does seem that a few more hours could have been spared in order to determine Taylor's duties and responsibilities and, therefore, whether the Union had properly qualified itself to ask the Board for relief.

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before the Board. To avoid this delay, the statute as finally enacted was changed so that the officers of the unions would have to file non-Communist affidavits before the Board could proceed to dispose of a labor case. Senator Taft was not expressing a general view as to how litigation in unfair labor practice proceedings was to be conducted. Certainly he did not say that the Board's definition of "officers" upon which the Board made a determination of the compliance of a union with the statute should not be subject to challenge on the part of an employer in unfair labor practice proceedings in order to save time in the administration of the Act.

The Board also points (Petitioner's brief, p. 13, fn. 5) to a portion of the report of the Joint Committee on Labor Management Relations, which was made in the year after the passage of the Taft-Hartley Act. The comments of this Joint Congressional Committee do not, however, touch the precise issue here involved. The report stated:

> "Board hearings must be confined to evidence going into the merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives" (Sen. Rep. No. 986, Part 3, 80th Cong. 2d Sess., p. 45).

That the Committee only had in mind that certain questions of fact in regard to the compliance of the union Section 9(h) should not be litigated in the unfair labor practice proceeding is made clear by another statement immediately preceding the above-quoted sentence on page 45 of the report:

> "If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to its having been filed, the records will be hopelessly overburdened with such proof."

Furthermore, the policy of expediting the administration of the Act must be balanced against the consideration that the statute should be correctly interpreted. Surely Congress did not mean that the Board should frustrate its policy of eliminating Communists from positions of leadership by applying an incorrect definition of "officers" who are required to file affidavits. Yet this anomalous result will occur if the Board is permitted to make a binding determination of compliance upon the basis of an erroneous definition of "officers" without that definition being subject to judicial review. The policy against unnecessary delay may well outweigh the value of litigating issues of fact, previously determined by independent investigation of the Board, in the unfair labor practice proceeding. But where as here a determination of compliance is based upon an erroneous interpretation of the statute, this Court, we submit, has decided in the *Highland Park* decision that the policy of not allowing an incorrect construction of Section 9(h) to be applied in unfair labor practice proceedings prevails over the need to expedite the hearing.[6]

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[6]The Board also cites (Petitioner's brief, p. 13, fn. 5) three cases to support its argument that the question of compliance raised in this case must be left exclusively to the Board's administrative determination in order to prevent delay. *N. L. R. B.* v. *Greensboro Coca-Cola Bottling Co.*, 180 F. 2d 840 (4th Cir. 1950); *N. L. R. B.* v. *Wiltse*, 188 F. 2d 917 (6th Cir. 1951), certiorari denied *sub. nom. Ann Arbor Press, Inc.* v. *N. L. R. B.*, 342 U. S. 859 (1951); *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645 (6th Cir. 1954). These cases merely decide that, in the interest of expediting hearings of unfair labor practice charges, the Board does not have to prove affirmatively in an unfair labor case that the union had in fact filed affidavits before it can validly decide the unfair labor practice charge. These decisions do not hold that the employer may not raise questions of law as to the Board's determination of compliance.

In support of its position that the employer should not be permitted to challenge the compliance of a union in an unfair labor practice proceeding, the Board points out that it will provide a collateral proceeding for determining questions of compliance when parties to unfair labor practice cases show the need for it (Petitioner's brief, pp. 6, 7, 15).

However valuable this practice may be in settling disputes as to issues of fact in regard to the compliance of unions, resort to such a collateral proceeding would have been futile here. The Board clearly indicated that if the Respondent had asked for and had obtained a collateral proceeding and that if the Respondent had proved what it offered to show in the unfair labor practice proceeding regarding Mr. Taylor's position, it would have decided in the collateral proceeding that Mr. Taylor was not an officer under its "constitutional" test (R. 530a).[7] Therefore, Respondent raised the issue of compliance in the unfair practice proceeding itself so that upon the petition for judicial enforcement of the Board's order it could be sure of a fair opportunity to challenge the Board's definition of "officers."

[7] The Respondent well knew before the hearing of the unfair labor practice charge in this case that the Board would decide the question of the compliance status of the union against it in a collateral proceeding. The Respondent had urged in an earlier representation proceeding between the Respondent and the same charging Union herein, Case No. 9-RC-1235, 96 N. L. R. B. No. 209, that the union was not in compliance. As the Trial Examiner notes in this case, the Board took the same view in regard to the failure of Mr. Taylor to file an affidavit in the representation proceeding as it does in this case (R. 518a).

The Court Below Correctly Determined That the Board Must Adopt a Functional Test in Interpreting the Term "Officer" in Section 9(h).

Respondent contends that the Board's definition of the term "officer" is arbitrary and wholly inadequate to serve the legislative policy underlying Section 9(h). Rather, it is submitted, the term "officer" should be held to include all persons whose duties, responsibilities, and influence in the union measure up to those of an officer as that term is ordinarily understood. Such a definition, which looks to the functions which executives of labor unions exercise rather than the labels by which their positions are designated, is consistent with the intention of Congress to avoid Communist domination of labor union leadership.

This Court has held in the *Highland Park* case that Congress in enacting Section 9(h) meant to "wholly eradicate and bar from leadership in the American labor movement, *at each and every level*, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government." 341 U. S. at 325. (Emphasis added.) Certainly, then, Congress meant to require affidavits of all union executives whose positions of leadership and influence give them an important role in labor relations, regardless of whether those positions are called offices in the union constitution. Surely, compliance with Section 9(h) by the relatively few people who occupy positions listed as offices in the union constitutions would fall far short of reaching into each and every level of power and influence in the American labor movement.

It cannot be seriously argued that a Communist would not eagerly grasp the opportunity to be Regional Director of the C. I. O. Respondent's claim is that it could show, if permitted, that Mr. Taylor had a working control over every C. I. O. local union and affiliated international union which operates within the confines of the Commonwealth of Kentucky and elsewhere within Taylor's region; that every action or move of importance relating to these C. I. O. unions is cleared through Mr. Taylor's office; that Mr. Taylor's influence frequently reaches the collective bargaining table, and that his power and prestige among the C. I. O. members of Kentucky is impressive and undeniable. Obviously the opportunities for a Communist in this post of union leadership to create friction in labor relations and to obstruct interstate commerce are so great that the policy of eradicating opportunities for Communist domination would not achieve its goal if regional directors are not held to be officers who must file affidavits. If the Board's "constitutional" test is upheld, wily Communists will merely seek those positions of influence which are not denominated offices in the union constitution. The Board's "constitutional" test will become a shield behind which they may hide.

On the other hand, the "functional" test for determining who are "officers" (*supra*, p. 16), it is submitted, is a reasonable construction of the statute and can appropriately be applied in this case to hold Regional Director Taylor an officer under Section 9(h). Respondent believes that reasonable people would consider an executive to be an officer of a union if he exer-

cises wide executive powers influencing the conduct of many others in union affairs.[8] Since Congress understood the potentialities for perverting the labor movement if positions of power (whether or not labeled offices in the union constitution) in the unions fall into the hands of Communists,[9] it is submitted that Congress meant that the term "officers" should be taken in this same popular sense.[10] How else would Congress extirpate Communist leaders "at each and every level" of the American labor movement? It seems clear that

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[8]The Board takes the view that "officer" is ordinarily understood to mean one whose position is listed as such in the constitution of a union or in the corporate charter in the case of a business corporation (Petitioner's brief, p. 16). It may not be unusual to look to the corporation charter as defining the officers in deciding technical questions of corporation law. But this is not such a case. The best source for the most common meaning of the words as used in everyday parlance is a dictionary. Webster's Dictionary defines "office" broadly as: "Position of trust, ministration, or authority . . .; an executive position with a corporation, institution, etc." An officer is: "One who holds an office. . . ."

See also *Watters* v. *Bank of America*, 9 Cal. 2d 46, 69 P. 2d 839, 842 (1937), where the court held that the "ordinary and usual meaning" of the word "officer" was "an employee invested with a part of the executive authority and who has a position of trust or authority in the regular and continued employment of the corporation."

[9]See *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 387-389 (1950). In that case, which upheld the constitutionality of Section 9(h), Chief Justice Vinson discussed at length the Communist threat to the American labor movement which Congress saw and tried to prevent by passing Section 9(h).

[10]This Court noted in *N. L. R. B.* v. *Highland Park*, 341 U. S. at 321, 325, that if Congress had meant the language of Section 9(h) to have other than its ordinarily accepted meaning, it would have provided special definitions. Since Congress has not specially defined "officers," it must have intended, therefore, that the term be used in its ordinary sense.

a broad, popular definition of "officers" is here required in carrying out a strong legislative policy."[1]

Finally, it may be noted that the Board urges that its construction of Section 9(h) should be given great weight since it is the agency to which is entrusted the administration of the statute (Petitioner's brief, p. 17). But actually the Board has vacated and abandoned in considerable measure that responsibility which the Board claims for itself, for making a workable definition of the term "officer." It has in fact transferred that duty to the labor organizations. The union may define its officers as it likes by calling or

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[1] The courts, in construing statutes so as to carry out the underlying legislative purpose have held holders of executive posts to be officers regardless of whether their positions are labelled as offices in the constitution, charter, or by-laws of an organization. In *Colby v. Klune*, 178 F. 2d 872, 873 (2d Cir., 1949), where, in defining the term "officers" for the purpose of Section 16(b) of the Securities Exchange Act of 1934, restricting "insider" profit-taking in corporate stock transactions, the court said:

> "It includes, *inter alia*, a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions. It is immaterial how his functions are labelled or how defined in the by-laws, or that he does or does not act under the supervision of some other corporate representative."

In *E. Clemons Horst Co.* v. *Industrial Accident Commission*, 184 Cal. 189, 193 Pac. 105 (1920), it was held that the superintendent of a plant was an officer within the meaning of the workmen's compensation law providing for increasing the amount of recovery when an employee was injured by reason of the wilful misconduct of an officer of the corporation, and *In re St. Lawrence & A. R. Co.*, 133 N. Y. 270, 31 N. E. 218 (1892), held that an attorney appointed by the railroad to certify petitions and pleadings for the institution of condemnation proceedings was an "officer" of the corporation within the statute requiring the petition in condemnation proceedings to be verified by an officer of the corporation.

not calling an executive position an office in the union constitution. It seems an extraordinary request to ask the courts to defer to a construction of the statute which is ultimately controlled by the very unions which it was the purpose of Congress to regulate.

CONCLUSION.

Respondent believes that the statement of the Congressional purpose in enacting Section 9(h) found in the *Highland Park* case (*supra*, p. 16) furnishes an adequate guide for the definition of "officers," and that the Court below properly rejected the Board's "constitutional" test as too narrow. Therefore, it is respectfully submitted that there is no need for this Court to review this case to determine the proper definition.

It is respectfully submitted that for the foregoing reasons the petition for writ of certiorari should be denied.

JOHN K. SKAGGS, JR.,
JAMES E. FAHEY,
Counsel for Respondent.

APPENDIX A—COURT OF APPEALS ORDER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Docket No. 12,316
Order February 15, 1955

National Labor Relations Board, Petitioner

v.

Coca-Cola Bottling Company of Louisville, Inc., Respondent

Before Allen, Martin and McAllister, Circuit Judges.

This case came on to be heard upon the record and briefs and oral argument of counsel:

And it appearing that respondent at the hearing herein contended that W. B. Taylor, CIO Regional Director for Kentucky, is an officer of the CIO and is required under Section 9(h) of the Labor Management Relations Act, 29 U. S. C. 159(h), to file a non-Communist affidavit:

And it being conceded that said W. B. Taylor had not filed such an affidavit;

And it appearing that in support of its contention respondent offered to show that said W. B. Taylor is an officer of the CIO, that he exercises administrative and executive powers over United Brewery and Soft Drink Workers Local 20, and exercises a working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region;

And it appearing that the Trial Examiner excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceedings, in which action the Trial Examiner was sustained by the Board;

And it appearing that respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9(h); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326;

The case is hereby remanded with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to this court.

Approved for entry:

(s) Florence E. Allen,
United States Circuit Judge.

APPENDIX B—RULE INVOLVED

Section 102.13 (b) of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 Fed. Reg. 1934, 1938, provides:

> Sec. 102.13. . . .
>
> (b) for the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:
>
> (1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.
>
> (2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.
>
> (3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 79.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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WESTERFIELD-BONTE CO. • INCORPORATED • LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 79.

NATIONAL LABOR RELATIONS BOARD, - *Petitioner,*

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC., - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT

BRIEF FOR THE RESPONDENT.

The Respondent accepts, pursuant to Rule 40(3) of United States Supreme Court, the presentment in Petitioners' Brief of Orders and Opinions below; Jurisdiction; and Statement of the Case.

STATUTE AND RULE INVOLVED.

Sections 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h), are set forth in the Appendix (*infra*, pp. 75-77). Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. 102.13, is set forth in the Appendix (*infra*, pp. 77-79).

QUESTIONS PRESENTED.

1. Whether the Respondent Employer may challenge in an unfair labor practice proceeding the determination of the National Labor Relations Board that a union is in compliance with Section 9(h) of the National Labor Relations Act when that determination is based on an alleged erroneous construction of the statute.

2. Whether the application in this case of the Board's "constitutional" test for determining who are officers required to file non-Communist affidavits under Section 9(h) of the National Labor Relations Act is erroneous.

SUMMARY OF ARGUMENT.

I.

The fundamental ground of difference between the Respondent and the Board lies in the construction of the term "officer" applied by the Board in determining whether a union is in compliance with Section 9(h). The Respondent contends that "officers", as it appears in Section 9(h), must be defined so as to include all union executives whose duties, responsibilities, and influence in unions measure up to those of an "officer" as that term is ordinarily understood (the "functional" test). The Board, however, defines the "officers" of a union as only those who hold positions designated as offices in the constitution of the union (the "constitutional" test).

Under this "constitutional" test the Board has no cause to consider and evaluate the facts as to particular union executives' duties and functions in determining the question of officership, and in effect treats such facts as irrelevant. The Respondent contends that the Board's test is too narrow. It is asserted that other union executives, besides those denominated in the constitution of a labor organization may properly be held to be "officers," if they are found, upon an investigation of their duties and functions, to possess the characteristics of commanding power, prestige, and influence in union affairs, commonly associated with the idea of official leadership.

"constitutional" test in deciding the case,[10] it could in the enforcement proceedings in the Circuit Court of Appeals seek to challenge the Board's "constitutional" test.

Respondent does not quarrel with the Board's view (Petitioner's brief, pp. 15-48)—which is that the compliance status of a union is exclusively a matter for it, as the appropriate administrative agency, to determine without the right of the Respondent to raise this question in an unfair labor practice proceeding—in its entirety. The Respondent does contend that it properly could challenge the legal basis of the Board's ruling that Mr. Taylor was not an officer and hence need not have filed an affidavit for the C.I.O. to be in compliance. But Respondent does not assert any right to contest the Board's determination of issues of fact in regard to a union's compliance status. This case presents no such instance of an administrative determination of a fact. This case does not, for example, involve a situation where the Board asserts, and the Respondent denies, that Regional Director Taylor, has in fact filed an affidavit. Nor is there a dispute as to the veracity of

[10] "There was, of course, always the chance that the Board would decide to depart from a strict application of the "constitutional" test. Indeed, Chairman Farmer and Member Rodgers of the Board in ruling on this case reserved opinion as to whether the "constitutional" test could be taken as "the exclusive basis for determining compliance" in all cases, although they joined "in this decision as a proper application of the existing rule" (R. 531a, fn. 15). Farmer and Rodgers did not indicate why they thought the "constitutional" test might not necessarily be the sole basis of deciding compliance in other cases but found its application in this case proper.

The Respondent thus seeks to challenge the Board's determination of compliance on a point of law, the definition of "officers" applied by the Board in administratively determining the compliance status of unions. Respondent does not assert that a party to a labor hearing has the right to contest the Board's *ex parte* administrative conclusions on factual issues in respect to a union's compliance status. But, it submits, the Board's definition of "officers" is subject to judicial review.

Previous judicial decisions plainly establish the right of the Respondent to challenge the Board's definition of "officers" in the manner here contended for. The opinion of this Court in *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326 (1951), authoritatively establishes the right of a party to an unfair labor practice proceeding to challenge the legal construction of Section 9(h) applied in determining the compliance of a union with Section 9(h), since the issue goes to the heart of the validity of the labor case proceedings and the Board's decision of the case. Consistently with the *Highland Park* decision, the Courts of Appeals, in regard to questions of compliance with Section 9(h), have drawn a sharp line between the non-litigability of issues of fact which have been resolved by the Board in its *ex parte* administrative determination of union compliance with Section 9(h), and, on the other hand, the right of an employer to challenge the legal basis of the Board's administrative determination of the compliance status of a union.

The Respondent finds in the legislative history of Section 9(h) an utter absence of any expression of in-

affidavits on file."[11] Also, there is here no question of conflicting factual inferences sought to be drawn from established facts. It would be a different case if the Board had ruled, either upon hearing the rejected proof in regard to Mr. Taylor's position which the Respondent offered or upon an independent investigation of the facts as to Mr. Taylor's role in labor affairs in Kentucky, as follows:

> "Upon an examination of the facts as to the duties and functions exercised by Regional Director Taylor, we have concluded that his power and influence in union affairs and labor relations is actually too insignificant and unimportant for him to be considered an officer within the meaning of Section 9(h)."

Respondent does not assert a right to challenge the Board's ruling in respect to such factual conclusions, but the Board has not considered the facts as to Mr. Taylor's position and made findings. Indeed the Board has treated such facts and the possible inferences to be drawn from them as irrelevant. In effect the Board finds:

> "Under our 'constitutional' test, Mr. Taylor is not, as a matter of law, to be considered an officer because his position is not, and never has been, denominated an officer in the C.I.O. constitution, regardless of what control he exercises over

[11] A similar example would arise where an employer contested the completeness in form and content of affidavits on file. The Board necessarily finds that the affidavits on file are sufficient in form and content in making its administrative determination of compliance (Petitioner's brief, p. 17).

tent on the part of the enacting Congress that the Board's definition of "officers" should not be subject to challenge by a party to a labor case proceeding. Since Congress did not indicate that the legal construction of Section 9(h) was to be left exclusively to the Board, it is to be assumed that Congress intended that the Board's interpretation of the term "officers" be subject to judicial review, as the *Highland Park* decision plainly indicates.

Contrary to the Board's suggestion, Respondent contends that hearing the Respondent's evidence, which had a direct bearing on the correctness of the Board's construction and application of the term "officer", would not have materially protracted the hearing of the case. Furthermore, the Respondent places the blame for any delay which would result from hearing evidence on the duties and functions of labor leaders in this or future labor cases upon the Board's practice of deciding the question of officer status on the sole basis of whether a man's position is designated an office in a union constitution. For if the facts as to the duties and functions of labor leaders are relevant and necessary to the decision of whether a man is an officer or not (as Respondent contends) and, if, nevertheless, the Board fails (as it does) to consider such facts in making its administrative determination of compliance, then the only opportunity for the consideration of such facts is in the labor case hearing itself. On the other hand the Board could adopt the "functional" test and base its *ex parte* administrative decision of officership upon a consideration of the duties and functions of

labor leaders. Its factual administrative determination of officership would then be conclusive in the labor proceeding itself in the light of the cases which hold that the Board's administrative determination of questions of fact in regard to a union's compliance status are not litigable in labor case hearings.

II.

Finding and applying the correct definition of "officers" is a matter of the greatest importance in view of the strong anti-Communist labor policy embodied by Congress in Section 9(h). Respondent contends that the Board's "constitutional" test approach to the problem is fundamentally unsound because under it the Board does not have occasion to investigate and evaluate the facts as to the positions which union executives hold—in short, the realities of union leadership—in determining compliance questions.

The legislative history of Section 9(h) indicates that Congress understood the term "officers" to mean important union "leaders" who are in positions of "authority and control." In the light of this legislative history, the Board's test is too narrow. There are union executives, such as Regional Director Taylor, who possess the characteristics of leadership to a degree which touches official stature within the understanding of the legislators of Section 9(h), even though they are not designated as "officers" in their union's constitution.

Such union leaders, who enjoy positions of "authority and control" in the unions, are within the definition

tends, where the basic issue is the construction of the language of Section 9(h) applied by the Board in deciding a union's compliance status. Therefore, we submit, the Court of Appeals correctly ruled that the Respondent should have the opportunity to establish that "the functions and jurisdiction of said W. B. Taylor" are legally relevant to the question of whether Regional Director Taylor is to be considered an officer whose compliance with Section 9(h) was indispensably necessary to the validity of the Board's decision on the unfair labor practice charges.

I.

The Respondent Has the Right to Challenge the Determination of the Board That a Union Is in Compliance With Section 9(h) When That Determination Is Based on an Alleged Erroneous Construction of the Statute.

A. PRIOR JUDICIAL DECISIONS ESTABLISH THE RIGHT OF A PARTY TO THE UNFAIR LABOR PRACTICE PROCEEDING TO CHALLENGE THE BOARD'S ADMINISTRATIVE DETERMINATION OF THE COMPLIANCE STATUS OF A UNION IN RESPECT TO ISSUES OF LAW.

Previous judicial decisions under Section 9(h) clearly indicate the extent to which the courts have recognized the right of a party to unfair labor practice proceedings to challenge the Board's determination of the compliance status of a union.

Section 9(h) of the Act plainly provides that the Board is prohibited from issuing a complaint pursuant to a charge to unfair labor practice made by a labor organization where officers of the charging union or its affiliates have not complied with the affidavit-filing re-

of "officers" under the "functional" test, but are erroneously excluded under the "constitutional" test.

Furthermore, judicial consideration of the term "officers" reiterates the emphasis of the enacting Congress on qualities of "leadership" as the keynote of the meaning of the term "officer." And the authoritative pronouncement of this Court in the *Highland Park* case, and also a decision of a Seventh Circuit (as well as the ruling of the court below) indicate that the Board's test is too restrictive, and these decisions establish the correctness of the Respondent's "functional" test.

Both parties agree that the term "officer", as it appears in Section 9(h), is to be defined in its ordinary and usual sense. But the Board's "constitutional" test in fact is only consistent with a narrow definition of the term applied in deciding technical questions of the law of corporations and not with the ordinary meaning of the word. Reference to the dictionary definition and other authorities demonstrates that the "functional" test follows the usual definition of the term.

The Board's definition of "officers" is patently arbitrary and unreasonable because it mechanically decides the question of officership in respect to every sort of labor organization without regard to size or rank in the structural hierarchy of organized labor. In making the determination of officer status turn on the sole basis of the list of officers contained in a union constitution, the Board disregards the fact that the positions designated as offices in the constitutions of various unions may differ widely. Marked disparity may occur even

quirement of the Section. The courts following the clear command of Section 9(h), have repeatedly held that, where unions have not made timely compliance with the affidavit-filing requirement of the section, the Board is precluded from exercising its functions at the instance of such non-complying unions. *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322 (1951)[13]; *National Labor Relations Board* v. *Clark Shoe Co.*, 189 F. 2d 731 (1st Cir. 1951); *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650 (6th Cir. 1954); *Goodman Mfg. Co.* v. *National Labor Relations Board*, —— F. 2d —— (7th Cir. Nov. 10, 1955); *National Labor Relations Board* v. *Postex Cotton Mills*, 181 F. 2d 949 (5th Cir. 1950).[14]

[13]In *National Labor Relations Board* v. *Dant*, 344 U. S. 375 (1953), this Court also clearly indicated that the Board should not issue a complaint of unfair labor practice charges on behalf of a non-complying union. The specific issue involved in that case related to the exact time as of which the union must come into compliance with Section 9(h). The C.I.O. officers had filed affidavits prior to the issuance of a complaint by the Board, but subsequent to the filing of the charge of unfair practice by the charging union, an affiliate of the C.I.O. This Court held, by a literal reading of Section 9(h), which provides that "no complaint shall be issued pursuant to [an unfair labor practice] charge made by a labor organization . . . ." unless the requisite non-Communist affidavits are on file, that such compliance with Section 9(h) before the complaint was issued satisfied the requirements of Section 9(h). In reaching this decision, the opinion specifically pointed out that this interpretation of Section 9(h) would not give any benefit to a union which continued to be in non-compliance. For the Board could not issue a complaint during such non-compliance, and absent "the issuance of a complaint the filing of a charge is a useless act." 344 U. S. at 382, 383.

[14]The Petitioner cites (Petitioner's brief, p. 26) several cases wherein the Courts of Appeal have held that the Board need not allege and prove that the unions involved in a labor proceeding were in compliance with Section 9(h). However, these cases are not contrary to the above-cited cases. For as the Court said in *National*

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as between two labor organizations of comparable size and activity.

The Board's definition of "officers" is not entitled to the judicial deference which Respondent claims for it. Both sides agree that the proper definition of "officer" should be the ordinary and usual meaning of the term of "officer", although they disagree as to what that meaning is. Since the question is simply one of the ordinary meaning of the words of the statute, it is appropriate for the Court to exercise in this case the fullest scope of its reviewing powers. Furthermore, the Board's definition of "officers" is not entitled to "peculiar weight" as the construction of the statute by the agency entrusted with its administration, as the Board contends, since the Board has in effect, by it "constitutional" test, improperly sub-delegated the responsibility for determining the application of the term "officer" to the very unions which it was the purpose of Congress to regulate.

It has been held by the Courts of Appeal, that an employer might not raise and litigate the question of compliance with Section 9(h) by the union in the Board's proceedings where the employer sought to challenge the Board's determination in respect to a question of fact involved in the union's compliance status. *National Labor Relations Board* v. *Vulcan Furniture Mfg Corp.*, 214 F. 2d 369, 371 (5th Cir. 1954), *cert. denied*, 348 U. S. 873 (1954), *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (7th Cir. 1954). Neither of these cases, however, is in conflict with the decision of the Court below, for the reason that each of these cases decided only that a party to an unfair labor practice proceeding may not litigate questions of fact in regard to the compliance status of a union.

In *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (5th Cir. 1954), *cert. denied*, 328 U. S. 873 (1954), the Court held that the truthfulness or completeness of the non-Communist affidavits may not be litigated in an unfair labor practice proceeding. Since Respondent does not in this case urge that any of the union affidavits on file were false or insufficient, the problem of the *Vulcan Furni-*

Labor Relations Board v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650 (6th Cir. 1954), after noting and approving the decisions of a number of cases holding that the Board is not as a technical matter required to allege and prove that the union is in compliance: "This, of course, does not mean that compliance is not necessary in order for the Board to proceed. Compliance is necessary and failure to comply is a statutory bar to the proceeding." Certainly these cases do not hold that a party to a labor case may not challenge the definition of "officers" which the Board applies in deciding the compliance status of unions, which is the issue here.

ARGUMENT.

INTRODUCTION.

The issues in this case center around two major questions, (1) whether a party in an unfair labor practice proceeding may challenge the Board's determination that a union is in compliance with Section 9(h) on a fundamental point of law, namely, the definition of "officers" upon which the Board based its determination of compliance, and (2) whether the Respondent is correct in maintaining that the Board's definition of "officers", who are required by Section 9(h) to file affidavits, is clearly wrong. However, these two questions are, in the Respondent's view, closely interrelated. Therefore, it would appear appropriate briefly to analyze both questions together with a very summary reference to the manner in which these questions happen to come before this court, in order to clarify the fundamental problems raised by this case.

This case arises from an unfair labor practice proceeding. In this proceeding the Respondent questioned the jurisdiction of the National Labor Relations Board to decide the merits of an unfair labor practice proceeding on the ground that the Congress of Industrial Relations (C.I.O.), with which the charging union herein, the United Brewery and Soft Drink Workers, Local 20 (The Union), is affiliated, was not in compliance with Section 9(h) of the National Labor Relations Act (29 U. S. C. Section 159(h)). That section provides that the Board shall not investigate any question

concerning the representation of employees nor issue any complaint pursuant to a charge of unfair labor practice unless each officer of the labor organization seeking to invoke the machinery of the Act, and each officer of any national or international union with which the charging union is affiliated shall have filed with the Board an affidavit stating that he is not a member of the Communist Party or supports any organization that believes in or teaches the overthrow of the Government by force or illegal methods. Specifically, the Respondent contended that the conceded failure of one W. B. Taylor, Regional Director in the Commonwealth of Kentucky for the C.I.O., to file a non-Communist affidavit rendered the charging Union in non-compliance with Section 9(h) and precluded the Board from proceeding with the case.

In the hearing before the Trial Examiner, Respondent offered to show that Mr. Taylor occupied so important a position of responsibility and authority in the affairs of the C.I.O. that he was able to exercise great influence on the C.I.O. unions operating in Kentucky and in labor relations there.[1] Respondent's view was that one holding such an important executive post must be considered to be an "officer" of the C.I.O. within the meaning of Section 9(h), and, therefore, that Mr. Taylor must file a non-Communist affidavit regardless of the fact that the particular position held by Taylor was not listed as an office in the C.I.O. constitution, which was the Board's test for requiring the affidavit.

[1] R. 388a, 389a, 517a, 527a.

National Labor Relations Board v. *Louisville Cement Corporation*, 209 F. 2d 651, 653, decided by the Sixth Circuit the same day it rendered the opinion in the *Sharples* case, that Court held, citing the *Sharples* case, that the verity of affidavits, an issue of fact, is not a litigable matter before the Board.

The Courts of Appeal, however, have refused to apply the rule that questions of the compliance status of a union are not to be litigated in labor case proceedings, if the challenge goes to the *Board's determination of compliance on a point of law*, which is the basis for the challenge made in the instant case. To Respondent's knowledge, there have been only two cases reaching the Courts of Appeal in which parties to the proceeding before the Board have sought to contest whether or not the union involved was in compliance with Sec-

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not litigable in an unfair labor practice proceeding, meant only to uphold the Board's exclusive right to determine the facts as to a union's compliance status. This the court stated that "Congress may delegate the power to find or determine some *fact* or situation on which the operation of a law is conditioned . . . . Any action taken by the Board in this respect is in the nature of an investigation . . . and can be conducted on an *ex parte* basis. The *factual* determination of this question will thus be applicable to all unfair labor practice proceedings in which a particular union is involved with different respondents." (209 F. 2d at 654. (Emphasis added.) The Court at page 654 further quoted a passage from *National Labor Relations Board* v. *Wallick*, 188 F. 2d 917, 922 (6th Cir. 1951), *cert. denied* 342 U. S. 820, *Allen Archer Pipes, Inc.* v. *National Labor Relations Board*, 342 U. S. 820 (1951), where the Court in turn had quoted from the Report of the Joint Congressional Committee on Labor-Management Relations to Congress in 1948 (S. Rep. No. 986, Part 3, 80th Cong. 2d Sess., p. 45) wherein the Committee had anticipated that the "verity of the affidavit or the facts as to it having been filed" should not be litigable in labor case proceedings, such questions as the verity of affidavits or whether or not affidavits are on file are, of course, questions of fact, which have nothing to do with the construction and definition of the language of Section 9(h).

The Trial Examiner noted that it had been conceded that Mr. Taylor had not filed a non-Communist affidavit,[2] but he rejected Respondent's offer of proof as to the functions and power exercised by Mr. Taylor.[3]

The basis for the Trial Examiner's ruling was that questions of the compliance status of a union were for the administrative determination of the Board and were not litigable by the parties to an unfair labor practice proceeding. Furthermore, he indicated, the Board had determined that the unions involved were in compliance with Section 9(h) and that this determination of the Board was founded upon the fact that all the officers of the unions involved, who were listed as such in the unions' constitutions, had filed affidavits. The Board's determination of compliance was reached by the application of Section 102.13 (b) (3) of the Board's Rules and Regulations which defines "officer" as follows:

> "'The term 'officer' . . . shall mean any person occupying a position identified as an office in the constitution of the labor organization . . .'"[4]

The Board thereafter sustained the Trial Examiner's ruling on the same grounds, namely, (1) that the compliance status of a union was not litigable in unfair labor practice proceedings, and (2) that in any case the Board's administrative determination of compliance was correct since Mr. Taylor was not to be con-

[2] R. 517a, 388a.
[3] R. 517a.
[4] R. 516a-518a. The full text of Section 102.13 is set out in the Appendix, pp. 77-79.

tion 9(h), by challenging the definition of "officers" applied by the Board in determining the compliance status of such unions. These two cases are the Sixth Circuit's decision in this case and the *Goodman Mfg. Co.* v. *National Labor Relations Board*, ——F. 2d——, decided by the Seventh Circuit on November 10, 1955 (and since certiorari was granted herein). In both these cases the employers attacked the compliance of the unions involved by squarely challenging the definition of "officers" which the Board applied in making its determination that the unions were in compliance, that is, on a point of law. Both courts upheld the right of the employer to question the legal basis of the Board's determination of compliance.[16]

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[16]The Seventh Circuit in the *Goodman* case said:

"[T]he Board's present contention [that an employer may not litigate the compliance issue in an unfair labor practice proceeding] is too broad, for the Supreme Court [in *National Labor Relations Board* v. *Highland Park*, 341 U. S. 322, 325, 326 (1951)] has recognized that under some circumstances there may properly be judicial review of a union's compliance status. . . . It appears that courts ought not inquire into the factual or merely formal aspects thereof. Thus, in *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, it was held that the 'veracity' of a non-Communist affidavit, admittedly filed, could not be litigated in an unfair labor practice proceeding. Similarly, in *N.L.R.B.* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, the issue of 'the truthfulness of the affidavits' or 'whether the ostensible officers filing them are the true directors of the union involved' were outside the scope of judicial review. . . . [But in] *N.L.R.B.* v. *Coca-Cola Bottling Co. of Louisville*, 219 F. 2d 441 . . . wherein the Court of Appeals for the Sixth Circuit, notwithstanding the Board's contention that such a matter could not be litigated by the employer, ordered the Board's trial examiner to take evidence with respect to the status and jurisdiction of one Taylor, the C.I.O. Regional Director for Kentucky, who admittedly had not filed a non-communist affidavit. The court's order was based squarely on the employer's right to judicial review of

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sidered an officer because his position in the C.I.O. was not denominated as an "office" in the C.I.O. constitution.[5]

The fundamental ground of difference between the Respondent and the Board lies in the construction of the term "officer" which should be applied to determine which functionaries in a union are brought within the filing requirements of Section 9(h) of Act; and, hence, who must file affidavits before the Board may take jurisdiction of an unfair labor practice charge. The Board has adopted the rule that, absent evidence of intent of purposeful evasion of the filing requirements of Section 9(h),[6] only persons whose positions are so designated in the union constitutions are to be considered "officers" for the purpose of Section 9(h). The Board does not at any point investigate or consider the facts as to the functions and duties, or the relative power and influence, of union executives in determining which union functionaries are to be considered officers within the meaning of the filing requirement of Section 9(h).[7]

[5] R. 527a-531a.

[6] R. 528a; N.L.R.B. Rules and Regulations, Section 102.13 (b) (3) (Appendix, p. 79). Apparently the sole factor which the Board regards as indicative of a possible intent to evade the filing requirements of Section 9(h) is whether or not a particular position has been dropped from a union constitution at any time since the Taft-Hartley amendment introduced Section 9(h) into the National Labor Relations Act (see fn. 7, *infra*). In this case the Board pointed out that Taylor's position had not, even in the year before the Taft-Hartley Act, been listed in the C.I.O.'s constitution as an office (R. 531a).

[7] It is clear that the Board made no investigation of Regional Director Taylor's functions and duties in administratively deter-

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A comparison of the decisions of the Sixth Circuit in the *Sharples* case (*supra*, pp. 22, 23), and in the *Louisville Container Corporation* case (*supra*, p. 23), with the ruling of that court in this case, and of the decision of the Seventh Circuit in the *American Rubber Products* case (*supra*, pp. 21, 22), with its holding in the *Goodman Mfg. Co.* case, clearly illustrates that those courts have drawn a sharp line as to the extent to which the compliance status of a union can be the subject of litigation. On the one hand it is held that a party to a proceeding may not contest and litigate the Board's administrative determination of questions of fact in regard to union's compliance status. On the other hand both courts uphold the right of a party to be heard on the issue of the construction of Section 9(h) which the Board applies in determining compliance questions.

The *Goodman Mfg. Co.* case and the opinion below recognizing the right of the employer to challenge the Board's definition of the term "officer" are consistent with other cases which have upheld the right of a party to a labor proceeding to challenge the Board's construction of Section 9(h) on other points of law. In *National Labor Relations Board v. Clark Shoe Co.*, 189 F. 2d 731 (1st Cir. 1951), the question was whether, under Section 9(h), the filing of affidavits by officers of the C.I.O. subsequent to the filing of unfair labor practice charges by a C.I.O. affiliated union and after the Board

the substantial legal aspects of the compliance issue, and it cited as authority the *Highland Park Mfg. Co.* case.

[W]e think that the statement of law [in the *Coca Cola Bottling Co.* case] is correct and not in conflict with those decisions holding that the factual and formal aspects of compliance are outside the scope of judicial review. . . ."

The Respondent on the other hand contends that this definition is too narrow and cannot be the sole basis

mining the compliance of the unions herein involved with Section 9(h). As the Trial Examiner plainly indicated, the Board's *ex parte* administrative determination of compliance was limited to finding out that "all individuals holding positions designated as offices by the constitution and by-laws of the respective labor organizations herein . . . including the C.I.O., had duly complied with the requirements of subsection (h) by timely filing the non-Communist affidavit required by that subsection." (R. 516a-517a). So far as the Board was concerned, the question as to Taylor's status was at an end when it found that "it does not appear . . . that Taylor is a person occupying [a position identified as an office] in the current C.I.O. Constitution." (R. 530a-531a).

Indeed it is equally clear that the Board's general *ex parte* administrative practice in determining the compliance of a union with Section 9(h) is limited to checking the affidavits of union leaders on file with the list of officers contained in the Union constitution (Petitioner's brief, pp. 16-19, 39-41). The Board indicates (Petitioner's brief, pp. [illegible], 40, 41), that it also checks the affidavits on file with a certificate of union officers required by the Board to be filed by labor unions (Form NLRB-1080), but as this certificate itself only contains a list of the positions designated as offices in the union consitution, this cross-check does not involve an investigation of the duties and functions of union leaders, and in particular of those who are not listed in a union's constitution). And once having administratively decided who are the officers of a union involved in a labor case proceeding and that they have complied with Section 9(h), the Board prevents a party to the proceeding from therein offering for the Board's consideration evidence as to the duties and functions of a labor leader whose position is not constitutionally-designated an office by the rule that matters of the compliance status of a union are not litigable in the proceeding (R. 516a, 517a, 528a).

It is true that the Board, where it "has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of Section 9(h) of the Act," does occasionally conduct an investigation to determine whether such evasion exists. Section 102.13 (b) (3), N.L.R.B. Rules and Regulations (see Appendix, p. 79); *Compliance Status of Furniture Workers, Upholsterers, and Woodworkers Union, Local 576*, 107 N.L.R.B. 872 (1954). But again this does not involve a general investigation of functions and duties of labor leaders, for the test of evasion appears to be merely whether the union has amended its constitution since the enactment of Section

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of determining who are the officers of a union; that it is arbitrary and mechanical and frustrates the intent of Congress in enacting Section 9(h), which was to "*wholly eradicate and bar* from *leadership* in the American labor movement, *at each and every level*, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government."[8] (Emphasis supplied.) Respondent believes that a proper definition of "officer," and one which will have within itself the room to do the Congressional will of eliminat-

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9(h) by dropping a particular position from the list of union posts therein designated as offices (R. 531a). *Compliance Status of Furniture Workers, etc., supra*).

And the Board will investigate to determine what is the true constitutional list of officers where the union constitution is itself ambiguous. In *Compliance Status of Local No. 1150, U.E.W.*, 96 N.L.R.B. 1029 (1951), the Board resolved the ambiguity in regard to certain union posts, referred to in the constitution of the local but not specifically entitled "officers", by comparing that constitution with the parent international union's constitution which provided that the locals should have certain offices, including the particular positions in question. The Board decided, therefore, that these posts in the local were to be considered offices for the purposes of Section 9 (h). It is to be noted that the Board did not, however, consider extrinsic evidence concerning the local union leaders' duties and functions.

The Board also tells us that it "encourages parties to a proceeding to bring to its attention all matters affecting the union's compliance status," that it will entertain motions regarding the compliance status of unions, and may as a result "conduct extensive administrative investigations and hearings for the purpose of determining fraudulent omissions" from a union's constitutional list of offices (pp. 18, 40, 41, 61). But, as the Board plainly says, it is concerned with evasion of the "constitutional" test (Petitioner's brief, pp. 41, 61), as where a union office has been dropped from the constitution following the enactment of Section 9(h). The Board does not, however, encourage parties to bring up evidence concerning the functions and duties of a labor leader whose position is not and never has been designated an office in the union constitution, as this case bears witness.

[8] *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U. S. 321, 325 (1951).

cuted by each officer of any national or international labor organization of which the charging union was an affiliate or constituent unit.

The Board held that the C.I.O. was not a "national or international labor organization" as the words were used in the Act, and hence that the C.I.O. officers were not required to file affidavits before the Board could issue the complaint. This the question in the *Highland Park* case related to the Board's legal construction of the meaning of the term "national or international labor organization." In this case, the question is the legal construction of the term "officers" in Section 9(h) and the Board's determination of compliance founded upon its legal interpretation of that term.

The Board argued in the *Highland Park* case (as it does here), that its administrative determination that the union was in compliance (which determination was based on the Board's view of the proper construction of Section 9(h)) was not subject to challenge by the employer in an unfair labor practice proceeding.

But this Court held that the Board had wrongly interpreted the statute, and that the employer was correct in maintaining that the C. I. O. was a "national or international labor organization," whose officers must file affidavits. It also specifically rejected the Board's contention that its administrative determination of compliance in such a situation could not be contested. The opinion held that when the Board's determination of compliance involved an issue of law, as distinguished from questions of fact, the employer was not precluded from challenging in an unfair labor prac-

ing the threat of Communist leadership of the unions, must be broader than the Board's "constitutional" test or definition.

"Officers," we submit, must be defined so as to include all union executives whose duties, responsibilities, and influence in unions measure up to those of an officer as that term is ordinarily understood. This so-called "functional" test for determining officership would include all those union executives, such as Regional Director Taylor, whose positions of leadership and great responsibility give them a real opportunity to control and manipulate a sizeable segment of the labor movement.

Under the Board's "constitutional" test the distinction between officers and non-officers rests upon the arbitrary basis of whether or not the position of the union leader in question happens to be designated an officer in the union constitution. The process of decision of the question of officership under the Board's "constitutional" test thus becomes a mere mechanical checking of the list of officers contained in a union's constitution without any investigation or consideration of the facts as to union executives' duties and functions to determine whether other executive posts in the union beside those designated as offices in the union constitution reach official stature. Respondent's "functional" definition of "officers" would, on the other hand, require the Board, in determining who are the officers of the union, to consider the facts as to the commanding power, prestige and influence exercised within the union and upon labor management relations by important union executives, such as Regional Director Tay-

lor, whose posts are not denominated officers in the union constitution. In short, Respondent's "functional" test would take account of the realities of leadership in unions, which, Respondent believes, was what Congress intended.

Believing, as the Respondent does, that the Board's "constitutional" test for defining the term "officers" is too narrow and arbitrary and frustrates the intent of Congress to eradicate the threat of Communist domination at each and every level of the American labor movement, the Respondent submits that it had the right to raise a challenge to that definition when it was applied against Respondent in the unfair labor practice proceeding and before the Court of Appeals in proceedings to enforce the Board's ruling. It is Respondent's position that it has a right to be heard on its view of the proper definition of "officers," since the scope of the affidavit-filing requirement and, in turn, the very jurisdiction of the Board, depends upon the proper interpretation of this term. Respondent was familiar with the Board's "constitutional" test for defining "officers."[9] Nevertheless it raised the question of compliance with Section 9(h) in the unfair labor practice proceeding in order that, if the Board adhered to its

[9] The Board's "constitutional" test as set forth in its Rules and Regulations (Appendix, p. 79) is, and was at the time of the hearing, of course, a matter of public record. Furthermore, the Respondent had had previous personal experience with the Board's position. The Respondent had urged in an earlier representation proceeding between the Respondent and the same charging union herein, Case No. 9-RC-1235, 96 N.L.R.B. No. 209, that the Union was not in compliance. As the Trial Examiner noted in this case, the Board took the same view in regard to the failure of Mr. Taylor to file an affidavit in the representation proceeding as it does in this case. (R. 5189.)

Thus it appears that the Courts have deferred to the Board's ruling of non-litigability of the compliance status of the union in an unfair labor practice proceeding, but only where the Board's determination of compliance is challenged in respect of issues of fact involved in the Board's determination of compliance. The courts, however, have drawn the line where an employer seeks to question the legal interpretation of Section 9(h) which the Board applies in deciding labor cases, and have held that the employer may not be denied his right to be heard upon the proper construction of Section 9(h). Respondent respectfully submits, therefore, under the foregoing authorities, the Board cannot define the term "officers" as it appears in Section 9(h), and then foreclose all right of judicial review of its definition by invoking the rule that compliance questions are a matter for its exclusive *ex parte* determination.

B. THE LEGISLATIVE HISTORY OF SECTION 9(h) DOES NOT SUPPORT THE BOARD'S VIEW THAT ITS CONSTRUCTION OF SECTION 9(h) SHOULD NOT BE SUBJECT TO CHALLENGE BY A PARTY AGAINST WHOM SUCH CONSTRUCTION IS APPLIED IN AN UNFAIR LABOR PRACTICE PROCEEDING.

The Board contends that the legislative history of Section 9(h) indicates a Congressional intent that a party to an unfair labor practice proceeding should not be permitted to litigate the compliance status of unions in such proceedings, in order to expedite the resolution of other issues. To support this theory, the Board relies on certain statements made by Senator Taft while Section 9(h) was in the process of passage. Respond-

gnt believes that statements from the legislative history of Section 9(h) do not support the Board's conclusion, since such remarks were not uttered in reference to the problem of this case, namely, whether a party to an unfair labor practice proceeding may question the definition of "officers" which the Board applied in deciding that the unions involved were in compliance. Rather Respondent finds in the legislative history of Section 9(h) a total absence of any expression of intent by Congress to deprive parties in labor cases of the right to challenge the construction of the statute invoked against them in the adjudication of their rights and duties.

Senator Taft's remarks, which the Board cites (Petitioner's Brief, pp. 21-23),[17] were directed to explaining a change made in the mechanics of Section 9(h) while that provision was in process of passage.

In earlier versions of Section 9(h) it was provided that a union could not be certified as a representative of employees if its officers were Communists. While the anti-Communist provision of the statute stood in this form, the question of whether particular union officers were or were not in fact Communists would have had to be litigated in each case coming before the Board. Senator Taft explained that it was thought that the determination of whether a man was a Communist or not would unduly delay the hearing. Hence the wording of the statute was changed so that it simply

[17] The statements of Senator Taft which the Board quotes appear at 93 Cong. Rec. 3814, 3847, 4022, and also in the *Digest of the History of the Labor Management Relations Act, 1947*, Govt. Print. Off. 1948, pp. 1542, 1547, 1625 (hereinafter cited as *Leg. Hist.*).

provided that the officers of the union must file non-Communist affidavits before the Board could proceed to dispose of a labor case. In substance the test for determining whether the union had qualified itself to ask for relief came to be whether its officers had filed non-Communist affidavits, rather than whether the officers were in fact Communists. No doubt it was thought that the filing requirement would result in "smoking out" Communist labor leaders, without making the labor hearing a forum to decide a person's political convictions.

Senator Taft, however, was not expressing a general view as to how unfair labor practice proceedings were to be conducted. Certainly he did not say that the Board's definition of "officers", upon the basis of which the Board made a decision on the compliance status of a union, should not be subject to challenge by an employer in an unfair labor practice proceeding in order to save time in the administration of the act.

The Board also points (Petitioner's Brief, p. 24) to a portion of the Report to the Joint Congressional Committee on Labor-Management Relations. The comment of this Joint Congressional Committee, reporting to Congress in the year following the passage of Section 9(h), does not touch the precise issue herein involved. The Report stated:

> "Board hearings must be confined to evidence going to the merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargain representatives." (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45.)

the C.I.O. affiliates and in labor management affairs."[12]

The fundamental issue, therefore, may be stated in the following way, namely, whether the facts as to a union executive's functions and duties are legally relevant and necessary to deciding the question of officership. Under the Board's "constitutional" test they are irrelevant, but Respondent maintains that they are relevant. The answer lies in the view that is taken as to the proper definition of "officers."

Respondent thus seeks to challenge the Board's determination that the unions herein were in compliance with Section 9(h) in respect to a fundamental question of law—the definition of "officers" which the Board applied in making its determination of compliance. The Respondent contends that the Board may not rightfully shield its "constitutional" test, which the Respondent contends is too narrow, from all judicial scrutiny by simply stating the generality that the determination of questions of the compliance status of unions are within its exclusive administrative province and are not litigable in unfair labor practice proceedings. Such a rule may be applicable where a party to a labor case hearing seeks only to challenge the Board's determination of issues of fact in respect to a union's compliance status. It does not govern, Respondent con-

[12]The actual words of the Board were: "Moreover, had the Respondent . . . established . . . what it had offered to prove at the hearing herein, we are satisfied, and find, that under the Board's present 'constitutional' test, such proof would fall short of substantiating the Respondent's contention that Taylor was an officer of the C.I.O." R. 53a.

But the Committee only had in mind that certain questions of fact in regard to the compliance of unions with Section 9(h) should not be litigated in the unfair labor practice proceeding. This is made clear by another statement immediately preceding the above-quoted sentence on page 45 of the report:

> "If the parties to Board hearings are permitted to question the veracity of the affidavit or the fact to it having been filed, the records will be hopelessly overburdened with such proof."

This report has been used to support the rule of non-litigability of issues of fact administratively determined by the Board in regard to a union's compliance with Section 9(h). *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (6th Cir. 1954).[18] But, as the decision in this case by the Court of Appeals indicates, the courts have not understood this report to suggest that the Respondent may not challenge the construction of law upon which the Board's determination of compliance is founded.

Respondent has been unable to find, and the Board does not cite, any statement of Congressional intent that the need for expediting labor cases is so great that the Board could construe the definition of "officers" upon which its very jurisdiction of the case depends without that construction being subject to judicial review. In the absence of clear evidence that Congress

[18] See also p. 22, fn. 15, *supra*, and the statement of the Court of Appeals Seventh Circuit, in the *Goodman Manufacturing Co.* v. *National Labor Relations Board*: "It appears that courts ought not inquire into the factual or merely formal aspects [of a union's compliance with Section 9(h)]. —— F. 2d at ——.

intended that the determination of legal questions in regard to compliancy status of the union, as well as questions of fact, should be entrusted exclusively to the Board, it must be assumed that Congress did not mean to deprive parties to labor cases of all right to contest the interpretation of law applied in the case. For the usual rule is that "the order of an administrative tribunal may be set aside for an error of law, substantive or procedural." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 74 (1936) (Mr. Justice Brandeis' concurring opinion). And that rule is plainly applicable to cases arising under Section 9(h). *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326 (1951).[19]

[19] The Board also argues that Section 9(f) and (g) of the National Labor Relations Act (29 U. S. C. Section 159 (f), (g)) are parallel provisions to Section 9(h) and that permitting litigation by a party to a labor case in respect to Section 9(h) would necessarily result in similar litigation under Sections 9(f) and (g). (Appendix, pp. 75-77). Sections 9 (f) and (g) require a union to file with the Secretary of Labor certain financial and other data concerning the union before the Board may proceed to hear and decide a labor practice charge or a representation issue raised by the union. The Board urges that the Secretary of Labor would be required to defend his determinations as to such matters as the "form and content of the information to be filed, and the adequacy, accuracy and completeness of [the] information" (Petitioner's Brief, p. 29) under the rule in respect to Section 9(h) contended for by the Respondent. But all these questions are questions of fact in regard to the determination of compliance of a union with Section 9(f) and (g). The limited right of litigation, restricted only to the issue of the proper construction of Section 9(h), for which Respondents here contended, would not, if extended to Sections 9(f) and (g), permit any party to an unfair labor practice proceeding to dispute such factual determinations of the Secretary of Labor in respect to compliance with Sections 9(f) and (g).

Of course, it is possible that a respondent might seek to question the legal construction of Section 9(f) or (g) applied administratively in determining compliance with Section 9(f) or (g) under

(Footnote continued on following page)

C. EXPEDITION IN THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT IS NOT SACRIFICED BY THE RULE CONTENDED FOR BY THE RESPONDENT.

The Board urges that litigation of the question of the compliance of the unions with Section 9(h) in the manner here contended for would seriously impede the resolution of the unfair labor practice charges here in issue (Petitioner's brief, pp. 30-39). The Board points out that, in order for Respondent to substantiate its view that Regional Director Taylor is to be considered an officer of the C.I.O. in spite of the fact that his position is not denominated as such in the C.I.O. constitution, Respondent would have had to introduce evidence as to the role Mr. Taylor plays in the internal affairs of the C.I.O. and its affiliates and also evidence as to his functions in labor-management relations" (Petitioner's brief, p. 32). Further, the Board suggests the

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the rule contended for by the Respondent. The most obvious question that would be likely to arise is whether a particular union organization is a "labor organization" or a "national or international labor organization" within the meaning of Sections 9(f) or (g) and hence is brought under the filing requirements of Sections 9(f) and (g). If Sections 9(f) and (g) are parallel with Section 9(h), then it would seem that the *Highland Park* case, which upheld the right of a party to a labor case to challenge the Board's construction of the identical statutory term appearing in Section 9(h) (*supra*, pp. 26-29), conclusively establishes the right of a party to do the same thing in respect to Sections 9(f) and (g).

However, it is appropriate to note that this Court has not clearly ruled that the three subsections are parallel, this Court having only expressed in dictum that it "would seem that the construction of Section 9(h) would lead to a like construction of Sections 9(f) and (g)." *National Labor Relations Board* v. *Denver*, 344 U. S. 375, 383 (1953). And indeed the Board itself appears not to regard that case as conclusive of the question, since it has not always treated 9(f) and (g) as parallel with (h). See *Compliance Status of Plaster Tenders, Construction, General and Shopyard Laborers Local Union No. 802*, 111 N.L.R.B. 742 (1955).

Inc. case does not here arise. In *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (7th Cir. 1954), the issue was whether one Sheehan, a union representative, who had not filed an affidavit, was an officer or a *de facto* officer of the union. The Court noted that the Board had found upon an independent investigation that Sheehan was not an officer, either *de facto* or otherwise; and the Court held that the employer could not challenge this administrative determination of a *question of fact* in an unfair labor practice proceeding. No issue of the proper definition of "officer" in Section 9(h) was before the Court. The essential difference between the *American Rubber Products* case and the instant case is that Respondent here does challenge the Board's determination of law that Regional Director Taylor could not be an officer required to file an affidavit because his post is not *entitled* an office in the C.I.O. constitution.

Similarly in *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (1954), the Court of Appeals for the Sixth Circuit also indicated approval of the view that the Board could properly determine the facts as to the compliance status of a union without its conclusions being subject to litigation. But the court nowhere expressed the opinion that the definition of "officers" applied by the Board in making its determination of compliance should not be a litigable issue.[15] And in the case of

[15] It is clear that the Sixth Circuit, in adopting the view that the Board's determination of the compliance status of a union was

(Footnote continued on following page)

had issued its complaint in regard to such charges, but before the Board issued its order deciding the case, was sufficiently timely to validate the Board's proceeding with and deciding the case. The Board urged that the subsequent compliance with Section 9(h) "cured any defect which might originally have inhered in the Union's capacity to invoke the Board's aid", or, in other words, that as a matter of law the ultimate compliance by the C.I.O. satisfied Section 9(h) requirements. In holding that the compliance of the C.I.O. officers with Section 9(h) was not sufficiently timely and that therefore the Board should not have undertaken to decide the case, the court specifically held that the employer has standing to raise the issue of compliance in such circumstances. 189 F. 2d at 733.

This Court's decision in *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322 (1951), is an authoritative recognition of the right of the employer to challenge the Board's determination of the compliance status of the union when the question of compliance involves the legal construction of Section 9(h). In that case the Textile Workers Union charged the employer with an unfair labor practice; and in the proceeding thereby initiated, it developed that officers of the C.I.O., with which the charging union was affiliated, had not filed the non-Communist affidavits. The employer, in raising the compliance issue, relied on the language of the Act which provided that no complaint could be issued by the Board pursuant to a charge made by a labor organization unless there were on file with the Board non-Communist affidavits exe-

tice proceeding the compliance status of the union. Mr. Justice Jackson stated:

> "We think the [Board's] contention [that its administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding] is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U. S. at 325, 326.

We respectfully submit that the instant case is indistinguishable from the *Highland Park* decision. Both cases present the same issue, namely, whether the employer may challenge the Board's determination that the union was in compliance on a point of law, namely, the construction of certain terms which appear in Section 9(h). In neither case did any dispute over the facts arise. It was not denied in the *Highland Park* decision that the C.I.O. officers had not filed affidavits; nor here that Regional Director Taylor had not filed one. In both cases the simple issues related to (a) whether the statute should be construed so that the persons involved would be brought within the affidavit-filing requirement of the Act, and (b) whether an employer could question the Board's ruling that the statute did not require such persons to file affidavits. The *Highland Park* decision ruled in favor of the employer on both issues and, we submit, its holding is controlling here.

The Board, in seeking to distinguish the *Highland Park* decision from the case presented here (Petitioner's Brief, pp. 45-48), mistakenly argues that a question of "fact of compliance" by the C.I.O. is present here and relies on the following language of the *Highland Park* opinion:

> "If there were a dispute as to whether the C.I.O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact." 341 U. S. at 325.

But this language does not help the Board. Mr. Justice Jackson here was giving two examples of questions of the "fact of compliance" which he suggested might be held to be a matter for the Board's exclusive determination: (1) a dispute whether affidavits had or had not been filed, or (2) a dispute whether the affidavits on file were sufficient in form and content.

Respondent is unable to see that anything like the problems indicated in these examples is involved here. No one denies that Mr. Taylor had not filed an affidavit. The question is whether the statute makes it necessary for one in his position to file an affidavit. The Respondent does not urge that any of the C.I.O. affidavits which are on file are deficient in form or are otherwise unsatisfactory, but that under a proper definition of the term, Taylor is to be considered an "officer" who must file an affidavit.

same process of time-consuming investigation could be repeated in every labor case in which the compliance status of a union is challenged in the manner done so by the Respondent here (Petitioner's brief, pp. 31, 32-33, 35). And the conclusion sought to be drawn from these arguments is that the resulting delay and impediment to the disposition of the merits of labor cases is so great that the practice should not be held by this Court to be required.

Respondent's answer is (1) that hearing the Respondent's proof to support its view that Mr. Taylor is an officer would not actually have materially lengthened the hearing of this case; (2) that expending the limited amount of time necessary to hear such evidence is justified because this evidence has a direct bearing on the question of the correctness of the Board's "constitutional" test; and (3) that in any case the alleged delay involved in hearing evidence as to labor leaders' functions and duties in future labor case proceedings could be totally avoided if the Board adopted a "functional" test as the basis for its administrative determination of compliance questions.

(1) Actually the Trial Examiner would not have appreciably slowed down the determination of this case by allowing the Respondent to present its evidence on the important and influential role which Regional Director Taylor plays in labor affairs in Kentucky. Nearly three years elapsed from the filing of charges to the entry of the Board's order. The hearing itself, even without the introduction of the Respondent's evi-

dence, continued for a month.[2] In view of this we submit that a few more hours could have been spared in order to consider Taylor's duties and responsibilities and to determine from them whether or not Taylor's role with the C.I.O. rose to the dignity of that of an officer.

(2) The Respondent's offer of proof in regard to Regional Director Taylor's duties and functions directly challenges the Board's construction of Section 9(h) whereby the term "officer" is limited to those holding constitutionally designated officers. If the Respondent could substantiate its contention that the facts would show that Taylor's position measures up to that of an office, as Congress understood that term, Respondent would succeed in establishing its theory that the "constitutional" test cannot be the exclusive basis for determining officership. Hence, allowing the Respondent in this case to present its evidence would serve as the means of determining whether the Board's "constitutional" test is the proper basis for determining officer status. Surely Congress did not mean that the Board should frustrate its anti-Communist labor policy by applying an incorrect definition of "officers." Yet this anomalous result may occur if the Respondent is not permitted to challenge the Board's "constitutional" test by demonstrating that one who is plainly outside the "constitutional" definition of "officers" is nevertheless clearly an "officer" within the common meaning of the term, which is believed to be the meaning the Congress intended.

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[2] R. 4a-5a.

The policy against delaying labor hearings may well outweigh the desirability of a judicial review the correctness or reasonableness of the Board's factual conclusions, such as whether or not certain union leaders have actually filed affidavits or whether such affidavits are satisfactory in form and content or are veracious. Accord: *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.* (*supra*, pp. 21, 22); *National Labor Relations Board* v. *Sharples Chemicals, Inc.* (*supra*, pp. 22, 23); *American Rubber Products* v. *National Labor Relations Board* (*supra*, p. 22). But here Respondent's offer of evidence does not purport to controvert any contrary factual conclusions drawn by the Board in making its *ex parte* administrative determination of union compliance with Section 9 (h): Rather it was directed to an issue which the Board had, under its "constitutional" test, no occasion to consider, namely, whether Regional Director Taylor's duties and functions are such that he is to be considered an "officer" within the meaning of Section 9(h). Hence the Respondent's evidence has a direct bearing on the correctness of the Board's construction of the term "officer" in Section 9(h). Respondent, therefore, submits that the importance of hearing the evidence necessary to support its theory that the "constitutional" test cannot be the sole criterion for determining officership prevails over the need to expedite labor hearings. *Goodman Mfg. Co.* v. *National Labor Relations Board* (*supra*, p. 24); Accord: *National Labor Relations Board* v. *Highland Park Mfg. Co.* (*supra*, pp. 26-29).

(3) Finally the Respondent believes that the Board could consistently with the proposed "functional" test avoid all litigation of the question of union officership in labor case proceedings by changing its method of determining compliance questions. In other words, Respondent contends that the blame for whatever delay which would have resulted from hearing Respondent's proof lies in the Board's present practice of deciding questions of compliance under the "constitutional" test.

Respondent's basic objection to the Board's administrative process of decision by the "constitutional" test is that the Board does not investigate the duties and functions of union executive in determining officership, but rather decides the issue solely on the basis of the list of officers contained in the union constitution. Respondent believes that the determination of the officers of a union must properly be based on a consideration of the facts as to union leaders' position, influence, and power in union affairs and in labor-management relations (*supra*, pp. 14; 15; *infra*, p. 47). Thus it becomes necessary under the Respondent's "functional" test that the Board at some point should investigate the duties and functions of the leading executives of a union, even though they do not happen to be designated "officers" in the union constitution.

But Respondent does not, however, take the position that this consideration of the facts as to the functions and duties of a union executive must necessarily take place in the hearing of the labor case itself. Rather there seems to be no reason why the Board could not

make the necessary investigation of the facts when it undertakes its *ex parte* administrative determination of the compliance of a charging union preliminary to issuing the complaint initiating the hearing. If the Board did make such an investigation of the facts and then drew the conclusion that certain union executives measured up to the concept of officers and that the rest of the union functionaries do not, these findings would in Respondent's view be conclusive in the labor case hearing itself.[21] For the Board's determination that a particular union functionary is or is not an officer would be a matter of fact.[21] It, therefore, follows that such factual determinations would not be subject to litigation under the authority of the *Sharples Chemicals* case and of the *Vulcan Furniture* case (*supra*, pp. 21-23).[22]

[21]The Respondent stated in its discussion of the issues (*supra*, p. 17) that an entirely different case would be presented if the issue here were the inferences which the Board had drawn from an investigation of the facts as to Mr. Taylor's functions and duties. The Respondent would not urge that it has the right to challenge the Board's conclusion of compliance if the Board had made the following finding:

> "Upon prior investigation of the duties and functions exercised by Regional Director Taylor, we have concluded that in fact his power and influence in union affairs is too insignificant for him to be considered an officer within the meaning of Section 9(h)."

[22]Of course the party to an unfair labor practice proceeding would have the right, under Respondent's view to challenge the Board's construction of Section 9(h) in respect to the definition of "officers" if for example, the Board, while purporting to apply a "functional" test in actuality utterly failed to do so. Also it would be open for an employer to challenge the Board's factual conclusions as to a union's compliance status if it appeared that there were no "ostensible compliance". *National Labor Relations Board* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, 371, 372 (5th Cir. 1954); *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (5th Cir. 1951).

It is clear, therefore, that under Respondent's view the unfair labor hearing need not in the future be the forum for an investigation of the facts relating to union executives' positions as officers. All that would be needed is for the Board under a "functional" test or approach, somewhere, sometime, to make a realistic investigation of the duties and functions of executives of a union, and, upon the basis of such investigation, make its determination of officership. The essential thing is that the investigation be made, not where it is made nor whether the employer in a labor case be a participant in it. If the Board really believes that hearing evidence like that offered by Respondent before the trial examiner would significantly impede the resolution of the unfair labor practice issue in future cases, the Board has within its power[23] the means to make the necessary investigation of the facts in its *ex parte* administrative determination of compliance.[24]

[23] It has been held that the Board has wide discretion in shaping its procedure to administer the Act. *Wallace Corp. v. N.L.R.B.*, 323 U. S. 248, 253 (1944); accord: *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143 (1940).

[24] Of course there are probably other ways in which the Board could decide the question of union officership on the basis of a consideration of the facts as to union leaders' duties and functions and yet avoid hearing such facts in the representation or unfair labor practice proceeding itself. The Board's present practice of providing collateral hearings on issues raised by a party to a labor case in regard to a union's compliance status suggests another possible solution of the problem. The Board pointed out in its Decision and Order in this case (R. 529a) that it is the Board's practice to conduct a separate and collateral hearing in which issues as to the compliance status of a union involved in a labor case before it can be heard and determined, if need for such a hearing is shown. It seems that this collateral proceeding, which is apart from the hearing of the other issues raised in a labor case, could be made a

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It is true that in this case the Respondent sought to offer factual evidence in regard to Regional Director Taylor's duties and functions in the unfair labor prac-

forum in which the facts as to a labor leader's power and influence in labor affairs could be aired and a decision made as to whether such leader's position makes him an officer.

"And it might be possible to combine advantageously both an *ex parte* administrative investigation of the position, power, and influence of union leaders with the practice of providing collateral hearings on compliance questions. The Board might find from experience in its *ex parte* administrative investigations of labor leaders' functions and duties that the characteristics of leadership and power touching official stature are usually to be found only in certain union posts, and not in others. Thus the Board might discover that in a labor federation or an international union certain enumerated union executives, including, for example, regional directors, do exercise the duties and functions associated with officership, but that union stewards or shop-committeemen in the locals ordinarily do not. And the Board might decide that in making its administrative investigation of the union executives of a particular union it would only investigate those posts which it reasonably believes are likely to measure up to offices. It could then permit a party to a labor case, who tenders substantial evidence that another labor functionary outside the group of leaders administratively investigated by the Board nevertheless wields the power and influence of an officer, to be heard on the subject in a collateral hearing.

Yet it is clear that the Board would have to abandon the present "constitutional" test as the touchstone of decision if such collateral proceedings are to serve any real purpose in a case such as this one. Respondent did not at the hearing of this case petition the Board for such a hearing (R. 530a, Petitioner's Brief, pp. 6, 7). Clearly it would have been futile and time consuming for the Respondent to have attempted to induce the Board to hold a collateral hearing in this case on the question of whether Regional Director Taylor's executive duties and powers were such that he is properly to be considered an officer. The Board clearly stated that it would have decided in such a collateral hearing that Taylor was not an officer, because his position is not denominated as such in the C.I.O. constitution, regardless of what the Respondent could have shown as to his power and influence in labor affairs. The Board said that "had the Respondent proceeded by an appropriate motion to the Board and that had the Respondent established in a collateral hearing what it had offered to prove at the hearing herein, we are satisfied and find that under the Board's present 'constitutional' test such proof would fall short of substantiating the Respondent's contention that Taylor was an officer of the C.I.O." (R. 530a).

tice proceedings. But the Board had not made any investigation of Taylor's duties and functions. Yet the Respondent was of the opinion that the facts as to his position would demonstrate him to be an officer within a proper definition of the term "officer." Believing as it did that these facts as to Mr. Taylor's duties and functions were relevant to the question of Mr. Taylor's status in the union, and that the Board must take such facts into consideration in deciding whether he was an officer, Respondent could only hope to bring those facts to the Board's attention by offering proof in the hearing itself.[23]

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[23] The Board further urges that Congress was not in any way concerned in enacting Section 9(h) to confer any special rights or benefits on employers and that the interest of the employer is but a collateral one (Petitioner's Brief, pp. 44, 45). The implication from this is that the Respondent should, therefore, not be permitted to challenge the Board's determination of compliance with Section 9(h) in the manner here sought. Respondent submits that this argument overlooks the important rôle which the Respondent plays in the administration of Section 9(h).

Even though it may be that the fundamental purpose of Section 9(h) was, as the Board states (Petitioner's Brief, p. 44), to protect the *public interest* from Communist-inspired political strikes (*cf. Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 192-193 (1941)), nevertheless it is important to recognize the standing of the Respondent to challenge the construction of Section 9(h) because it is "the only person who [has] a sufficient interest to bring to the attention of the [Board or] the appellate court errors of law," in the construction and application of the term "officer" in Section 9(h). *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 477 (1940).

II.

Congress Intended the Term "Officer", as Used in Section 9(h) to be Construed so as to Connote Those Union Leaders Who Enjoy the Influence and Power Ordinarily Attributable to an Officer.

A. FINDING AND APPLYING THE CORRECT DEFINITION OF SECTION 9(h) IS A MATTER OF THE GREATEST IMPORTANCE IN VIEW OF THE STRONG ANTI-COMMUNIST LABOR POLICY EMBODIED IN SECTION 9(h).

The Petitioner's brief (p. 30) contains the statement that litigation of the question of a union's compliance status would create "opportunities for delay and would thus, substantially impair the Board's ability to perform *its principal statutory* functions under the Act." It seems clear from this reference to "principal statutory functions" that the Board regards the determination of the compliance status of a union, and hence whether the union has properly qualified itself to ask the Board for relief, of little importance as compared to its task of deciding representation issues and unfair labor practice charges. The Respondent hotly contests this view.[26] It is of course true that historically the

[26] In making the statement concerning its "principal statutory functions" (Petitioner's brief, p. 30), the Board apparently relies on a reference in the March, 1948, Report of the Joint Congressional Committee on Labor-Management Relations to the Board's "real function" in hearing labor cases (Petitioner's brief, pp. 24, 33). The quoted portion of the Committee Report (appearing on page 24 of Petitioner's brief) includes the following sentences:

> "If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to its having been filed, records will be hopelessly over-burdened with such proof. Board hearings must be confined to evidence going into

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Board was established for the express purpose of handling issues between labor and management concerning employee representation and the permissible labor practices to be employed between the two. And in the early days of its existence the Board was not obliged by law to concern itself with Communists in labor unions. However, the introduction of Section 9(h) into the National Labor Relations Act in 1947 reflected the development of a new and additional labor policy on the part of Congress. That policy was that the threat of Communist infiltration into the American labor movement should be checked.[27]

merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives." (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45).

Respondent believes that the Committee meant to indicate that litigation of such factual issues as "the veracity of the affidavit or the fact as to it having been filed" should not be allowed to interfere with the "real function" of a labor proceeding, *viz.*, to decide representation questions and unfair practice charges. And Respondent does not contend that the hearing should be a forum for the litigation of such issues. But Respondent does not believe that the Committee meant to suggest that it was not an important function of the Board to determine the officership of a union and hence whether it could according to Section 9(h) act in a labor matter at such a union's request. In light of the clear command of Section 9(h) that the Board should not act on behalf of a non-complying union, it is hard to see how Congress could have regarded the construction of Section 9(h), which is made the basis of determining compliance, as a matter of trivial concern.

[27] The legislative history of Section 9(h) is filled with the expressions of the members of Congress who saw a grave danger in Communist infiltration into the unions and Representative Bell in discussing the proposal which became the present Section 9(h) wanted Congress to protect the country "against the impending danger of having Communists in control of our great American labor organizations." 93 Cong. Rec. 3626, *Leg. His.*, 785. Congressman Barden sought a provision which would put "every safeguard

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As the language in Section 9(h) indicates, Congress particularly intended that a Communist dominated union should not have the aid and benefit of the Board's offices and the use of its processes in questions concerning representation of employees and unfair labor practices. Congress devised the non-Communist affidavit filing requirement as the method of excluding Communist-led unions from the benefits of the Act, and so provided in Section 9(h) that the Board could not act where the officers of the union involved, and even of its affiliated unions, had not filed the required affidavits. As the whole anti-Communist policy of Congress depends upon the enforcement of the affidavit-filing requirement, and as this, in turn, directly involves those who are to be considered "officers", Respondent can only conclude that finding and applying the correct definition of "officers" is of the highest importance.

If the true view were that Congress regarded the affidavit-filing requirement as a relatively trivial matter; the Board's mechanical checking of union officer affidavits against the list of offices enumerated in the union constitution might be a justifiable mode of determining the officership of a union, and hence the

possible around the membership of labor organizations and . . . save them from the troubles and grief that would come from this type [i. e., Communist] of leadership." 93 Cong. Rec. 3627, *Leg. Hist.*, 786. Representative Hallock stated that Section 9(h) was to deal with the matter of "Communist-dominated unions." 93 Cong. Rec. 6382, *Leg. Hist.*, 880. Also this Court has authoritatively recognized the danger of Communist activities in the American labor movement which Congress saw and sought to prevent. Chief Justice Vinson discussed the threat of Communist inspired political strikes which induced Congress to pass Section 9(h) in *American Communications Ass'n v. Douds*, 339 U. S. 382, 387-389 (1950), where this Court upheld the constitutionality of Section 9(h).

union's compliance status. But the whole anti-Communist policy of Congress in Section 9(h) is made to turn on the proper determination of officership in a union. Respondent, therefore, believes that such a determination of who are officers must be made on the basis of a consideration of the functions, duties, powers, and responsibilities of union leaders in executive posts, irrespective of how the union has labelled their positions. This so-called "functional" test for determining who are to be considered "officers" for the purposes of Section 9(h) necessarily involves realistic investigation and evaluation of the facts as to positions which particular union leaders hold. This consideration of the facts, as Respondent has pointed out (*supra*, pp. 39-43) might be made by an *ex parte* administrative investigation. Or, if the Board prefers, it may let a party to a labor case initiate the consideration by attempting to prove in the hearing that a particular union executive holds so important a position of power that he must be considered an officer. In any case the application of a "functional" approach, which calls for an investigation of the facts as to the role played by a union leader in question, is necessary to carry out the Congressional policy that Communist labor executives be removed from positions of power at "each and every level" of the American labor movement. *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. at 325.[28]

[28] At the very least it is necessary to have an investigation of the duties and functions of those labor executives who hold important and influential posts in the union, but whose positions are

(Footnote continued on following page)

B. A "FUNCTIONAL" TEST, SUCH AS IS SUGGESTED BY THE RESPONDENT IS NECESSARY TO EFFECTUATE THE CONGRESSIONAL POLICY OF ELIMINATING COMMUNISTS FROM IMPORTANT POSTS OF LEADERSHIP IN LABOR UNIONS.

Respondent contends that the Board's definition of the term "officer" is arbitrary and wholly inadequate to serve the legislative policy underlying Section 9(h). Rather, it is submitted, the term "officer" should be held to include all persons occupying posts of leadership in unions whose duties, responsibilities and influence in the union measure up to those of an officer as that term is ordinarily understood. Such a definition, which looks to the functions which executives of labor unions exercise rather than the labels by which their positions are designated, is consistent with the intention of Congress to avoid Communist domination of labor union leadership. Respondent further asserts that if the facts pertaining to the important position which Regional Director Taylor holds in union affairs in Kentucky and his influence in labor-management relations there were shown, it would be clear that he holds a position which would plainly come within the category of "officers" under the "functional" test.

The records of the discussions of members of Congress, while Section 9(h) was in the process of passage, plainly indicate that the term "officer" was not there

not denominated "offices" in the union constitution. It may be, however, that the Board need not investigate the duties and functions of the constitutionally-designated officers. The Board might perhaps find that the holders of such positions so universally exercise commanding authority that it is reasonable to assume that they are to be presumed to be "officers" within the meaning of Section 9(h).

understood in any narrow or technical sense. Rather the keynote was that Section 9(h) was aimed at Communist "leadership"[90] and was to prevent Communist "domination" in unions.[91] Congressmen, in referring to the persons to whom Section 9(h) would apply, used the term "leader" either alone or interchangeably with "officer."[92] Representative Bell stated that "Communists have gotten into positions of authority and control" and he sought to protect "against the impending danger of having Communists in control of our great American labor organizations."[93] Congressman Halleck spoke of what is now Section 9(h) as a provision seeking to deal with the matter of "Communist domination and leadership in unions."[94] So far as Respondent has been able to determine, there is not one instance in which any member of Congress expressly indicated that the term of "officer" was to be defined by reference to a union's constitution, nor even hint of as much. Quite to the contrary, the emphasis was on "leadership" in unions and on union leaders in "positions of authority and control." Surely the qualities of leadership such as power, prestige and influence in union affairs and upon labor-management relations are not limited exclusively to the very top group of union officials likely to be designated in a union constitution.

This Court has held in the *Highland Park* case that Congress in enacting Section 9(h) meant to "wholly

[90] 93 Cong. Rec. 3627, 3628, 6382; *Leg. Hist.*, 786-788.
[91] 93 Cong. Rec. 6382; *Leg. Hist.*, 880.
[92] 93 Cong. Rec. 3627; *Leg. Hist.*, 785-787.
[93] 93 Cong. Rec. 3626; *Leg. Hist.*, 785.
[94] 93 Cong. Rec. 6382; *Leg. Hist.*, 880.

eradicate and bar from *leadership* in the American labor movement, *at each and every level*, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government." 341 U. S. at 325. (Emphasis added.) Certainly, then Congress meant to require affidavits of all union executives whose positions of leadership and influence give them a commanding place in the affairs of their unions and a key role in labor relations, regardless of whether those positions are called offices in the union constitutions. Surely, compliance with Section 9(h) by the relatively few people who occupy positions listed as offices in the union constitutions would fall short of reaching into each and every level of power and influence in the American labor movement.

Similarly, the Court of Appeals, Seventh Circuit, in *Goodman Mfg. Co. v. N. L. R. B.*, ——F. 2d—— (1955), has found that the Board's "constitutional" test is too restrictive and that certain union executives whose positions were not denominated as offices in its constitution are nevertheless to be considered "officers" within the meaning of Section 9(h). In that case, which is the only case involving the definition of "officers" which has reached a Court of Appeals beside this case, the question was whether trustees and district secretaries of the international union with which the charging union was affiliated were to be considered officers. If they were officers, then their admitted failure to file affidavits precluded the Board from hearing the alleged unfair labor practice charges. The Board had held, consistent with its "constitutional" test, that such

union leaders were not officers because their positions were not designated as offices in the union constitution. The Court of Appeals, however, rejected the Board's view that the determinative factor should be whether the position in question is labelled as an office in the union constitution. The Court ruled that the rank of officer was not to be confined "to one of the very few persons who hold the highest rank and perform executive functions at the highest level." And upon considering the duties and functions of the union executives in question, the Court concluded that they were to be considered officers and within the filing requirements of Section 9(h).* The Court stated:

> "According to the controlling interpretation of the purpose of 29 U. S. C. A., §159(h), contained in *American Communications Assn., C.I.O., et al. v. Douds*, 339 U. S. 382, the non-communist affidavit requirement is directed at persons 'when, as officers, they direct union activities' (page 407), or, as alternatively phrased in Mr. Justice Frankfurter's concurring statement, as persons 'who hold positions of official power' (page 418). The District Secretaries are in this category; therefore, we hold that they are officers." —— F. 2d ——.

*In this instance the international unions' constitution itself outlined the duties and functions of the district secretaries and the locations, although those posts were not specifically designated "officers." The Court indicated that the status of officership could not be denied to "those who hold positions of trust which, in the labor organization's own view, are of sufficient importance to be established by its constitution." However, the decision cannot be construed to mean that union leaders must be referred to in some way in the union constitution, even though not specifically as officers, before they can be considered officers. The question of officer status of union leaders whose positions are in no way referred to in the union constitution was not before the Court.

Of course, it is true that some degree of leadership may be found among union functionaries who could not possibly be considered officers by any stretch of the imagination. Indeed it must surely be the case that certain individuals, who are mere members of a union, by their native talents act in some sense as leaders of their fellows. But Congressmen, in discussing the kind of union functionaries to whom the proposed Section 9(h) should apply, did not mean to include this type of leadership by the use of the term "leaders" (*supra*, p. 49). It is not without significance that Representative Hobbs referred to the holders of "positions of powerful leadership."[35] It is precisely this sort of leadership which Respondent means to comprehend by its "functional" test.[36] Necessarily the characterization of a particular union executive as an officer or not presents a problem of the degree to which those qualities of leadership are present. In turn this requires an evalu-

[35] 93 Cong. Rec. 3628; *Leg. Hist.* 788.

[36] Respondent by no means contends that every occupant of the lower posts in a union's structure is to be considered an officer. It is hard to see how many functionaries on the lowest levels could be considered officers under any test. However, the Board seems to suggest that under the Respondent's view of the term, persons such as union coordinators, stewards, committeemen, and the like are necessarily to be considered officers (Petitioner's brief, p. 61). Respondent would suppose that people would not ordinarily regard stewards and committeemen in a union local as officers. An analyst of the structure of labor unions has stated:

> "Another group of local union representatives, not considered officers in the strictest sense, are the shop committeemen, or stewards. . . . [T]hey are generally without voice except as members, in the shaping of policy and administrative decisions in the local." Hardman and Neufold, *The House of Labor* (1951), p. 29; see also Peterson, *American Labor Unions* (1945), p. 80.

(*Footnote continued on following page*)

ation of the facts as to functions and duties of the individual in question, and of the power and opportunity to command with which he is entrusted. Such evaluation is exactly the fundamental approach called for by the "functional" test. The "constitutional" test, on the other hand, cannot take into consideration the facts as to domination and leadership, because it is fundamentally rooted to a mechanical standard for deciding the question of officership, namely, whether or not the union post in question is designated an office in the union constitution.

The suggestion of the Board that the "functional" test is without objective criteria (Petitioner's brief, p. 64) is not an impressive argument. Of course, Re-

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Section 9(f)(6) requires unions to file with the Secretary of Labor a detailed statement concerning the procedure for election of "officers and stewards" of the union. In view of the foregoing it appears that Congress found it necessary to add the term "stewards" to bring those positions within the coverage of the subsection because it clearly felt that "stewards" were not officers. Similarly Congress inserted the term "agents" in addition to the term "officers" in Section 9(f) (2) and (3) which require that for a union to be in compliance with Section 9(f) it must file:

> (2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;
>
> (3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

It appears that the addition of "agents" and "stewards" in Section 9(f) was merely for the purpose of requiring certain information concerning union functionaries who are plainly not officers, but as to whom Congress deemed it advisable that such information be filed. The special denotation of these additional categories does not, however, as the Board seemingly suggests (Petitioner's brief, pp. 56-58), mean that the term officers in Section 9(h) was to be given in the very restrictive meaning of the "constitutional" test.

spondent cannot express a detailed formula of specific standards for the application of the "functional" test. For by its very nature the "functional" test depends on a consideration of the facts as to the incidence of leadership and power in a given union or federation. The Respondent does not pretend to sufficient knowledge and experience with the multitude of unions and labor organizations to predict in advance where the line is to be drawn as it relates to every union organization. For this task should be entrusted to the Board, as the agency commissioned by Congress to administer Section 9(h) (*National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130 (1944), and it is not to be supposed that the Board will be less able to work out adequate standards to guide the application of the term "officer" under the "functional" test, than in respect to other terms contained in the National Labor Relations Act, as for example the phrase "unit appropriate for the purpose of collective bargaining." (Section 9(b), 29 U. S. C. Section 159(b), provided, of course, the Board will give the task a try, which it has hithertofore not done.

Moreover, Respondent submits that a consideration of the case of Regional Director Taylor bears out Respondent's contention that the Board's "constitutional" test omits from the catagory of officers many union executives whom Congress intended to be considered officers and from whom Congress intended to require affidavits. If the facts as to Mr. Taylor's position were before the court it would be clear, Respondent believes, that Regional Director Taylor would properly

be considered an officer within the "functional" test: The C.I.O. and its affiliates comprise a vast organization of employees. Current membership in the C.I.O. unions totals approximately six million persons.[37] In view of this C.I.O. union empire, it would hardly be surprising to find that there are a number of executive positions of the greatest importance in the C.I.O., outside the very top group of the C.I.O. officers listed in the C.I.O. constitution. It may be that in a small local unit of a union the constitutional list of officers would in fact include all those executives whose authority is of such a nature that people would normally regard them as officers. But in the case of a labor federation like the C.I.O., Respondent submits that the constitutionally-designated offices cannot possibly include all those positions which properly are to be considered offices.

Respondent's claim is that it could show, if permitted, that Mr. Taylor had a working control over every C.I.O. local union and affiliated international union which operates within the confines of the Commonwealth of Kentucky and elsewhere within Taylor's region; that every action or move of importance relating to these C.I.O. unions is cleared through Mr. Taylor's office; that Mr. Taylor's influence frequently reaches the collective bargaining table; and that his power and prestige among the C.I.O. members of Kentucky is impressive and undeniable.

[37] *World Almanac* (1955), p. 58. This membership includes a very large portion of the nation's unionized working force. The A.F.L. is listed as containing 9,605,840 members, and membership in independent or unaffiliated unions is stated to approximate 2,500,000.

Indeed, the C.I.O. itself has considered the position of regional director to be one of the greatest importance in union affairs. The union newspaper, *The C.I.O. News*, carried an article in its October 24, 1949 issue, page 7, in which the following illuminating comments about the powers of the regional director appeared:

> "There are 41 . . . [regional directors] scattered throughout the country. And they have duties enough for ten times that number.
>
> "The 41 are CIO regional and sub-regional directors (36 of the former). They are CIO's link with local unions, with persons needing and desiring organization, with the community as a whole.
>
> "Theirs is the duty of preaching, talking, practicing and selling CIO in every nook and cranny of the land.
>
> "Regional directors form about a fourth of the 130 persons on the staff of CIO Vice President and Organization Director Allan S. Haywood. Others are Haywood's assistants, field representatives, organizers and office force. . . .
>
> "St. Louis is fairly close to the geographical center of America. It has a rather varied CIO membership. It has had a long and good labor history. . . . With no slight intended for anyone else, let's take a look at Delmond Garst, . . . regional director for Western Missouri and Southern Illinois (his region includes both the state capitals—Jefferson City, Mo., and Springfield, Ill.). In addition, he is Middle West director for the CIO Political Action Committee, covering Ohio, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Kansas,

Oklahoma and Missouri. And, he represents the Woodworkers in his area.

"Biggest unions in the area are the Auto Workers, the Steelworkers, the Electrical Workers (with the accompanying leftwing headache), Amalgamated Clothing, Textile, Brewery, Shoe, Gas-Coke, Newspaper Guild and, of course, the Communications Workers. Garst was extremely active in the drive which brought CWA into CIO.

"Del Garst, like all the other regional directors, came up through his own union. He's a native of Kentucky. A member of Local 25, UAW (United Auto Workers), St. Louis, he served the UAW for six years as a board member. In 1942, he was named CIO regional director for St. Louis. In August of that year, he was called to Washington for a two-week mission—and didn't get back to St. Louis permanently until nearly five years later.

"In the interim, he served CIO in various capacities during the war. His main work was on the War Labor Board. He signed the order which led to the famous forced removal by the Army of Sewell Avery from his Montgomery Ward offices . . . That's the background of Del Garst. It could just as well have been almost any of the other regional directors . . .

"Just what does a regional director do?

"Of course, there's a close work with the locals and internationals in this area. Whenever Garst wants to make a policy decision, he confers with representatives of the unions. Philip Weightman, former vice president of the Packinghouse

Workers, has been assigned to Garst by CIO and PAC, and attends conferences with the various affiliates . . . . Here's a typical schedule in the life of this typical regional director:

"A visit to the Unemployment Compensation office to make arrangements for quicker aid for CIO members.

"Conferences with Treasury drive officials. (CIO members are among the biggest investors in this drive.)

"A meeting of Community Chest leaders.

"A conference with the CIO Community Services Committee.

"A safety campaign conference.

"Visits to city officials to discuss municipal policies.

"A meeting with state officials.

"Negotiations for the amalgamated local industrial union, No. 1643, at St. Charles, Mo. (*The St. Charles Banner-News* is the only newspaper in America published by an all-CIO staff, mechanical, business office and editorial).

"Negotiations for the Woodworkers. (One local is 220 miles from St. Louis.)

"Negotiations for other unions when he is requested to enter the picture—which is often.

"Lots of organizational work; which has prospered under heavy handicaps in these Taft-Hartley days.

"Dictation and other office work with his secretary. . . .

"Conferences with A. F. Kojetinsky, Steelworkers' District 34 Director . . . .

"Speeches to college classes.

"Speeches to Kiwanis and other clubs.

"Speeches to church groups.

"Participation in CIO and civic forums.

"Participation in such activities as the regional CIO summer school, held last summer at Camp Monticelli, 20 miles from the city.

"Doing everything possible to have unions in his area carry out the adopted policies of National CIO. As an aid in this, he holds meetings twice a month with the various representatives and functionaries of the unions.

"Constant PAC work.

"(Missouri last year had just about the best PAC record of any state in the country. In Garst's big PAC district, the PAC-endorsed ticket of Truman and Barkley carried Ohio, Illinois, Wisconsin, Minnesota, Iowa, Nebraska, Oklahoma and Missouri. In all of the states, the liberal vote was vastly increased).

"A lot of trips to council meetings . . . .

"Dozens of phone calls on a wide range of subjects.

"An occasional trip to Washington, or some other city, for conferences with CIO President Philip Murray, Haywood, CIO Secretary-Treasurer James B. Carey, PAC Chairman Jack Kroll, and others.

"Lobbying in Springfield and Jefferson City for liberal measures."[38]

The article clearly indicates that the regional director is the "CIO's link with local unions, with persons needing and desiring organization, with the community as a whole." It also clearly indicates that

[38]The above excerpts from the article in the *C.I.O. News* appear in Marx, *American Labor Unions*, 43-45 (1950).

the regional director is in a position to make policy decisions. It states that whenever Garst wanted "to make a policy decision" he conferred with representatives of local and international unions in his area. He also does "everything possible to have the unions in his area carry out the adopted policies of the National C.I.O." Regional Director Garst was "extremely active" in bringing the Communications Workers into the C.I.O., and it is stated that he frequently enters into negotiations on labor-management relations for unions. The article also plainly indicates that Regional Director Garst engaged in a large amount of political activity in the state legislatures and also on the municipal level.

From this, Respondent respectfully submits that reasonable people would consider one who holds such a position an officer of the union. And Respondent submits that if it were shown that Regional Director Taylor exercises functions and duties comparable to those of the regional director described in the foregoing article it would be proper to hold him an officer within the meaning of Section 9(h).

Obviously the opportunities for a Communist in such a post to create friction in labor relations and to obstruct interstate commerce are immense. Certainly the policy of Congress to eradicate all opportunities for Communist domination of union organizations would not be achieved if regional directors are held not to be officers who must file affidavits. If the Board's "constitutional" test is upheld, wily Communists will merely seek those positions of influence

which are not denominated offices in the union constitution. The Board's "constitutional" test will become a shield behind which they may hide.

C. A "FUNCTIONAL" TEST FOR DETERMINING OFFICERSHIP IS CONSISTENT WITH THE ORDINARY AND USUAL MEANING OF THE TERM "OFFICER."

Congress saw and understood the potentiality for perversion of the labor movement if posts of executive power in the unions fell into the hands of the Communists (*supra*, pp. 44-47). It is not to be supposed that Congress, in devising the non-Communist affidavit filing requirement to check Communist infiltration into the unions, meant to have its anti-Communist labor policies frustrated by a narrow and excessively technical definition of the term "officers." Certainly a broad popular definition of "officer" is required in carrying out that strong legislative policy. How else would Congress intend to extirpate Communist leaders at "each and every level" of the American labor movement. This Court noted in *N. L. R. B.* v. *Highland Park*, 341 U. S. at 324, 325, that if Congress had meant the language of Section 9(h) to have other than its ordinarily accepted meaning, it would have provided special definitions. Since Congress has not specially defined "officers", it must have intended, therefore, that the term be used in its ordinary sense.

Indeed the Board agrees that the word is to be taken "in its usual and ordinary sense" (Petitioner's Brief, p. 50), although it disagrees with Respondent as to what is that meaning. It is clear then that both

sides of this case have committed themselves to the view that the definition of "officer" intended by Congress is the ordinary and usual meaning of the term.[39] But while the Board admits that the term "officer" should not be taken in some special and narrowly technical sense, nevertheless, it relies on technical rules from the law of corporations and advances the view that the term "officer" is to be applied only to those whose positions are denominated offices by the labor organization's constitution. (Petitioner's Brief, pp. 54, 55). It may be good corporation law, in deciding technical questions of corporate responsibility to stockholders and third persons who deal with the corporation, to look to the corporation charter to find the

[39] In the *Highland Park* case, where the question was whether the C.I.O. was a "national or international labor organization" within the meaning of Section 9(h), the Board argued that the language had a special and technical connotation in labor circles which excluded a labor federation such as the C.I.O. from its scope. Mr. Justice Frankfurter in a dissenting opinion expressed the view that the duty of the reviewing court was to "determine whether [the language in question has] a technical meaning when used in regard to matters of industrial relations." He thought that the best source for determining "whether a term used in the field of industrial relations has a technical connotation is the body to which Congress has committed the administration of the statute." And further he urged that, as nothing had been called to the attention of the court to suggest that the Board's technical construction of the phrase was not in accord with the meaning recognized in labor circles, the Court should accept in Board's view that the C.I.O. was not "national or international labor organization." 341 U. S. at 326, 327. The majority, however, found that Congress intended the word to be taken in its usual sense since Congress did not specially define the word, and that in the speech of the people the C.I.O. was a "national union." 341 U. S. at 324. It is clear that the problem of the possible technical meaning of language and accordingly of the proper reviewing function of the Court in such a situation does not arise in this case, since both parties regard the ordinary meaning of the term "officer" as the touchstone of decision.

offices of the corporation; but, it is submitted, such approach is wholly inappropriate where the problem is one of carrying into effect a broad legislative policy as is involved here.

If the touchstone for defining "officers" is the everyday meaning of the term, a good source for the most common meaning of the word as used in everyday parlance is an abridged dictionary. Webster's defines "officer" broadly as: "Position of trust, ministration, or authority . . . an executive position with a corporation, institution, etc." An "executive" is defined as: "any person or body charged with administrative or executive work." An officer is: "one who holds an office."[a] Judicial expression of the ordinary meaning of the term is consistent with the dictionary definition. In *Walters* v. *Bank of America*, 9 Cal. 2d 46, 69 P. 2d 839, 842 (1937), the Court held that the "ordinary and usual meaning" of the word "officer" was "an employee invested with a part of the executive authority and who has a position of trust or authority in the regular and continued employment of the corporation."

The Courts, in construing statutes so as to carry out the underlying legislative purpose have applied such a broad popular definition and have held that holders of executive posts were officers regardless of whether their positions are labelled "officers" in constitutions, charters, or by-laws of an organization.

[a] *Webster's Collegiate Dictionary* (abridged), Fifth Edition, 1953. The definition in *Webster's New International Dictionary* (unabridged) Second Edition, 1954, is not to the contrary. Similarly it defines an "office" as: "Position of trust or ministration."

In *Colby v. Klune*, 178 F. 2d 872, 873 (2d Cir. 1949), the Court in defining the term "offices" for the purpose of Section 16(b) of the *Securities Exchange Act of 1934*, 15 U. S. C. A. Section 78p, restricting "insider" profit-taking in corporate stock transactions, said:

> "It includes, *inter alia*, a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions. *It is immaterial how his functions are labelled or how defined in the by-laws*, or that he does or does not act under the supervision of some other corporate representative." (Emphasis added.)

In *E. Clemons Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 193 Pac. 105 (1920), it was held that the superintendent of a plant was an officer within the meaning of the workmen's compensation law providing for increasing the amount of recovery when an employee was injured by reason of the willful misconduct of an officer of the corporation.

And in *In re St. Lawrence & A. R. Co.*, 133 N. Y. 270, 31 N. E. 218 (1892), it was held that an attorney appointed by the railroad to certify petitions and pleadings for the institution of condemnation proceedings was an officer of the corporation within the statute requiring the petition in condemnation proceedings to be verified by an officer of the corporation.

D. THE SUBSEQUENT HISTORY OF ABORTIVE ATTEMPTS TO AMEND SECTION 9(h) DOES NOT SUPPORT THE CORRECTNESS OF THE "CONSTITUTIONAL" TEST.

The Board points out that certain proposals to extend the coverage of the affidavit-filing requirements were offered in Congress in the years following the enactment of Section 9(h) but were not passed. It is argued that these unsuccessful attempts to broaden Section 9(h) show that the proponents of such amendments read the term "officers" as the Board does and that the proponents recognized that substantial alteration of Section 9(h) was necessary to give that section the meaning urged by the Respondent (Petitioner's Brief, pp. 58-60).

But an analysis of these amendments clearly demonstrates the fallacy of this reasoning. For example, Senator Taft's amendment of 1949 would have required affidavits of "members of all policy-forming and governing bodies of the labor organizations as well as those designated as officers by the constitution of the labor organization."[78] This apparently would have meant that all delegates to a union convention should file non-Communist affidavits. Clearly this proposal went far beyond the "constitutional" test, and also would have extended the coverage to many who would not be considered "officers" even under the proposed "functional" test. The failure of such amendment indicates that Congress wished to confine the affidavit-filing requirement to persons who were

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[78] See, e.g., Sen. Rep. No. 99, Part 2, 81st Cong., 1st Sess., pp. 1, 45-48, 51-52.

"officers", *not that the term "officer" was intended to receive a restrictive definition at the hands of the Board.*

Certainly the fact that these amendments failed does not in any way suggest that the legislators thought the Board's "constitutional" test was reasonable and proper. The majority of Congress may have believed (as the Sixth Circuit in the instant case and the Seventh Circuit have now held, *supra*, pp. 50-52) that the reasonable interpretation of the term "officer" was the "functional" definition which Respondent proposes, and that an attempt to elaborate by amendment would introduce mere surplusage into Section 9(h).[12] We submit that this subsequent legislative history of Section 9(h) is too inconclusive to afford support of the "constitutional" test.

On the other hand we have the clear and repeated reference of the members of the Congress which enacted Section 9(h) to the union executives intended to be covered as the union "leaders" who are in "positions of authority and control" (*supra*, pp. 48-49). This indicates that the Congress had in mind the concept of an "officer" as one who exercises the duties and responsibility characteristic of a leader, which is the basis of the "functional" test but not of the "constitutional" test.

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[12]This is especially true in view of the fact that the question of the definition of "officers" had not been passed on by the courts until this case was heard and decided in February, 1955, by the Sixth Circuit (R. 541a), which was in the year after the last of the proposed amendments referred to by the Board (Petitioner's Brief, p. 59).

Certainly it seems that Congress did not intend the arbitrary line-drawing that results from the application of the "constitutional" test. For example, compare the powers and influence of a C.I.O. regional director such as the one described in the excerpt from the *C.I.O. News* (*supra*, pp. 56-60), with the position of the president of a local union or of a small independent union. Surely one would have to admit that the opportunities open for a Communist are greater in the case of the regional director acting on a statewide level than in the case of the officer of the local whose jurisdiction extends only to a relative handful of workers. If the test for determining officers is to be keyed to "leadership" and to the characteristics of "authority and control," as the legislative history of the statute certainly indicates, one would surely regard a regional director as the greater officer of the two. Yet under the "constitutional" test, the president of the local, because he is listed in the local's constitution, will have to file an affidavit, but the regional director will not.

E. THE BOARD'S "CONSTITUTIONAL" TEST IS PATENTLY UNREASONABLE AND ARBITRARY.

Respondent contends that the Board's constitutional test is so arbitrary and unreasonable that it cannot be permitted to stand.

The Board's "constitutional" test for the most part ignores the realities of union leadership. The Board, under its test, does not have cause to investigate the facts as to the duties and functions of labor

leaders, since the decision as to officership depends upon the circumstances that a union leader is or is not designated as "officer" by the terms of the constitution of his union. As a result, the Board's test utterly fails in drawing the line between officers and non-officers, to distinguish big unions from small, locals from international unions or labor federations. The same "constitutional" test is applied to all types of unions of whatever size. It may be that the list of officers contained in the constitution of some small local includes just about all the leaders whose duties and functions reach official stature. But surely the vast official powers and duties exercised in a great labor federation, or in a large international union must be distributed among a more numerous personnel than the limited number of officers who are named in its constitution.[13]

Even as between two unions of approximately equal size and rank in the hierarchy of union organizations ranging from the locals to the federations, the group of officers in one of the unions may not be the same under the Board's test as the group of officers in the

[13]The record in this case illustrates an anomalous situation which results from the "constitutional" test. A letter of January 16, 1952, from the Board to the Respondent (Respondent's Exhibit No. 6, R. 27a-29a) listed the charging United Brewery Workers Local 20 as having at that date sixteen officers, the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America as having only four officers, and the C.I.O. with eleven. Presumably these lists of officers were the group of officers so designated in the respective constitutions of these organizations. It is hard to believe that there were not more than four persons in the large parent International who exercised the duties and functions associated with high official leadership when the smaller unit, the Local, had sixteen whom even the Board regarded as officers.

other union. Glaring discrepancies may result between the two unions because the constitution of one local may differ from that of another in respect to the exact number and kind of positions listed as offices. Common experience with the organizational structures of associated groups of people of whatever sort suggests the possibility that one labor union may, for example, choose to dignify the holder of a certain executive post with the title of Vice-president while another union may withhold this titular honor from one holding an analogous position in its union ranks. The Board itself implies as much. Petitioner's brief (p. 61) suggests that Congress could have extended the coverage of Section 9(h) to international representatives, organizers, coordinators, stewards committeemen, etc., irrespective of whether their posts are denominated in the union constitution, but that Congress did not do so. The Board then adds that if any of these "officials" are in fact designated as "officers" in a particular union's constitution, they are required to file non-Communist affidavits (Petitioner's brief, p. 61, fn. 33).

The *Goodman Mfg. Co.* case (*supra*, pp. 30-32), presents another instance of awkward results stemming from the "constitutional" test. In that case, the posts of the union leaders whose officership status was in question, the district secretaries and the trustees of the international union, were expressly created in the union constitution. But although that constitution outlined the duties and functions of these individuals, it did not denominate their positions as "offices", and so the

Board did not regard the incumbents as "officers." The Seventh Circuit Court of Appeals, however, rejected the Board's technical insistence on designation *qua* "office." That Court held that characterization as officers could not be denied to those who hold positions of obvious responsibility and trust, which in the labor organization's own view are of sufficient importance to be established by its constitution.

It is respectfully submitted, therefore, that in view of the arbitrary results which flow from the Board's "constitutional test", it cannot be permitted to stand.

F. THE BOARD'S CONSTRUCTION AND APPLICATION OF THE TERM "OFFICER" IS NOT ENTITLED TO THE DEFERENCE WHICH THE BOARD CLAIMS FOR IT.

(a) BECAUSE THE QUESTION PRESENTED IS ONE OF THE ORDINARY AND USUAL MEANING OF THE LANGUAGE USED BY CONGRESS.

(b) BECAUSE THE BOARD IMPROPERLY DELEGATES THE RESPONSIBILITY FOR THE DETERMINATION OF OFFICER STATUS TO THE UNIONS UNDER THE "CONSTITUTIONAL" TEST.

The Board in its closing argument in substance urges this Court to defer to its construction and application of the term "officer" embodied in the "constitutional" test (Petitioner's brief, pp. 65, 66). Respondent submits that, in any case, if the test for review of this case should be held to be "reasonableness and not rightness," as the Board asserts, this Court should strike down the Board's "constitutional" test as applied here. In view of the foregoing arguments, demonstrating that the Board's test narrowly restricts the coverage of the Section 9(h), contrary to the intent of Congress to drive out Communist "leadership" from

the American labor movement and that the results of the application of that test lead to extremely arbitrary and anomalous results, the Board's test cannot be said even to be reasonable. However, Respondent contends that it is inappropriate for this Court to defer to the Board's administrative ruling under the circumstances of this case.

The Board urges that this Court should defer to its construction and application of the term "officers" under the authority of *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111 (1944); *Gray v. Powell*, 314 U. S. 402 (1941); *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (1939). In each of these cases the agency involved was able to support the reasonableness of its construction and application of the law by factual data illustrating the appropriateness of its ruling, as the discussions of the facts presented in these cases by the writers of the opinions therein indicate. And, the test of judicial deference in this group of cases was summed up in the most recent of them, the *Hearst Publications* case, as follows: "The Board's determination . . . is to be accepted, if it has 'warrant in the record' and a reasonable basis in the law." 322 U. S. 111, 131 (1944).

These decisions clearly have no application in the case at hand because, here, unlike the situations presented in those cases, the Board does not purport to base its construction and application of the law upon a careful investigation of the facts as to the incidence of power and leadership in labor unions generally or in the particular unions herein involved. Indeed the

issue in this case is whether a consideration of the duties and functions of Regional Director Taylor, *which the Board has not undertaken*, is relevant and necessary for a proper decision as to Taylor's alleged status as an officer. Respondent submits that it is impossible to apply in this case the rule of "warrant in the record" when the record contains no factual information as to Regional Director Taylor's position or his duties and functions in the union.

The Board does not present as support for its construction and application of the term "officers" any factual data, which is the fruit of an investigation or consideration as to the facts of leadership and official power in the unions. Rather, it urges that its "constitutional" test is consistent with the ordinary and usual meaning of "officers" (Petitioner's brief, pp. 50-55). Since the Board places the question on that level, there is no occasion for judicial deference to the Board's definition. For when words are used in their ordinary meaning their construction presents a question solely of law, an issue fully appropriate for the exercise of the widest scope of judicial review. Accord: *Great Northern Railway Co.* v. *Merchants' Elevator Company*, 259 U. S. 285, 291-296 (1922). And when this Court has found that Congress used language in Section 9(h) in its "ordinarily accepted sense," it has been concerned in reviewing the Board's ruling to determine whether the Board's construction is correct, not merely reasonable. *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. at 324, 325 (Compare Mr. Justice Douglas' dissent at pages 327, 328).

The Board also urges that its construction of Section 9(h) should be given great weight since it is the agency to which is entrusted the administration of the statute (Petitioner's brief, p. 65). But actually the Board has vacated and abandoned in considerable measure, if not entirely, that responsibility which the Board claims for itself for making a workable definition of the term "officer." It has in fact transferred that duty to the labor organizations. A union may define its officers as it likes by calling or not calling an executive position an office in the union constitution. It seems an extraordinary request to ask the courts to defer to a construction of the statute which is ultimately controlled by the very unions which it was the purpose of Congress to regulate.

CONCLUSION.

Respondent believes that the Board's process of decision as to the compliance status of union by application of the "constitutional" test, without investigating the facts as to the duties and functions of important union executives who are not designated in the union constitution as officers, is plainly wrong. Therefore, it is respectfully submitted that the Court of Appeals below correctly ordered the case remanded to the National Labor Relations Board with instruction to permit Respondent to introduce testimony as to the functions and extent of jurisdiction of W. B. Taylor as Regional Director of the C.I.O.

It is respectfully submitted that, for the foregoing reasons, the order of the Court of Appeals, Sixth Circuit, should be affirmed.

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APPENDIX.

Statute and Rule Involved.

A. Provisions of Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h).

Representatives and Elections.

Sec. 9.

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal years, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue

under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-months period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

B. Provisions of Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. (1955 Supp.) 102.13.

Sec. 102.13. Compliance with section 9 (f), (g), and (h) of the act. (a) For the purpose of the rules and regulations in this part, compliance with section 9 (f) and (g) of the act means (1) that the Secretary of Labor has issued to the labor organization, pursuant to the rules of the Department of Labor, a letter showing that the labor organization has filed the material required under section 9 (f) and (g) of the act; (2) that the labor organization has filed with the general counsel in Washington, D. C., or with the

regional director, either as part of the charge (or petition) or otherwise; the duplicate copy of such compliance letter; and (3) that the labor organization has filed with the general counsel or with the regional director for the region in which the proceeding is pending or in which it customarily files cases, either as part of the charge (or petition) or otherwise, a declaration executed by an authorized agent stating that the labor organization has complied with section 9 (f) (B) (2) of the act requiring that it furnish to all of its members copies of the financial report filed with the Department of Labor, and setting forth the method by which such compliance was made.

(b) For the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge, (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any

organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9(h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.

SUPREME COURT, U.S.
FILED
JAN 6 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 79.

NATIONAL LABOR RELATIONS BOARD, - Petitioner,

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC., - - - - - Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN REPLY TO THE BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*.

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BRIEF FOR RESPONDENT IN REPLY TO THE BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*.

INTRODUCTION.

This brief is submitted by Respondent in reply to the brief *Amicus Curiae* submitted by the American Federation of Labor and Congress of Industrial Organizations (C.I.O.). Its purpose is to clear up certain misconceptions which Respondent believes have been introduced by the C.I.O. brief.

ARGUMENT.

I. The C.I.O. Erroneously Attempts to Inject an Issue as to the Appropriateness of This Court's Decision in the *Highland Park* Case Into This Case.

The C.I.O. repeatedly refers to this Court's decision in *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322 (1951), and to what it considers to be the evil consequences of the ruling of this Court in that case (*Amicus* brief, pp. 2, 3, 14, 15, 17-19). The C.I.O. brief seems, therefore, to be an attempt to inject an additional issue into this case namely, the validity and appropriateness of this Court's decision in that earlier case. But this is an issue which does not arise between the parties. Both the Board and the Respondent rely on, and assume the validity of, the decision in the *Highland Park* case.[1] Hence, Respondent submits that, to the extent that the C.I.O.'s brief is devoted to discussing the merits of the *Highland Park* decision, that brief must be recognized to have no bearing on this case.

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[1]The Board urges that this case presents a question expressly reserved in the *Highland Park* case, namely, whether an employer may challenge the Board's determination of compliance by a union with Section 9(h) in respect to a question of the fact of compliance (Petitioner's brief, pp. 45-48). Respondent on the other hand contends that this case is indistinguishable from the *Highland Park* decision (Respondent's brief, pp. 28-29). It asserts that the question presented here, just as in the *Highland Park* case, is whether a party to a labor case proceeding may challenge the Board's determination of union compliance on a point of law, namely, the construction of certain terms which appear in Section 9(h). The Respondent also views the *Highland Park* decision as supporting its contention that the Board's "constitutional" test is too narrow and mechanical and is contrary to the meaning of the term "officers" intended by Congress (Respondent's brief, pp. 49, 50).

The purpose of the C.I.O. in attempting to revive the settled questions of the *Highland Park* decision may be to weaken the authority of the *Highland Park* decision as it bears on this case. But the great propositions of the *Highland Park* case—which are (1) that a party to an unfair labor practice proceeding has the right to challenge the Board's determination of the compliance of a union with Section 9(h) of the National Labor Relations Act on a point of law, namely, the construction of the terms appearing in that section applied by the Board in determining compliance, and (2) that Congress meant by enacting Section 9(h) to "wholly eradicate and bar from leadership at each and every level, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government" (341 U. S. at 325)[2]—stand unimpaired. There have been no subsequent judicial decisions which have in any way cast doubt on the reasoning and results reached in that decision, and indeed the case has received the implicit approval of Congress. Subsequent to the decision in the *Highland Park* case, Congress enacted the present Section 18 of the National Labor Relations Act (65 Stat. 601, 29 U. S. C., Section 168). This section provides:

> "No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of Section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organ-

[2] See Respondent's brief, pp. 26-29, 49, 50.

izations to have complied with the requirements of Section 9(f), (g), or (h) of the aforesaid Act prior to December 22, 1949. . . ."

This provision was designed to validate the Board's certifications of C.I.O. affiliated unions prior to December 22, 1949, the date on which the C.I.O. had come into compliance with Section 9(h) (see *National Labor Relations Board* v. *Clark Shoe Co.*, 189 F. 2d 731, 732 (1st Cir. 1951)), which necessarily had been voided by the *Highland Park* decision that Section 9(h) applied to the C.I.O. and that the failure of the C.I.O. offices to file non-Communist affidavits barred the Board from hearing unfair labor practice charges and representation issues at the instance of C.I.O. affiliated unions.[3] Congress, therefore, sought only to remedy certain retroactive results which stemmed from the over-turning of the Board's ruling that Section 9(h) did not apply to the C.I.O. It did not, when considering legislation dealing with the *Highland Park* decision, in any way seek to modify the principles adopted by the Court in that decision. Therefore, it must be assumed that Congress whole-heartedly approved of the doctrines enunciated in the *Highland Park* case. Hence, Respondent submits that the validity and authority of the *Highland Park* decision, as it bears on this case, is beyond doubt.

[3]Section 18 applies only to labor cases involving questions of employee representation. Congress did not deem it advisable to reinstate unfair labor practice complaints which had necessarily been invalidated by the *Highland Park* decision. (See *Amicus* brief, p. 18).

II. The C.I.O. Wrongly Implies That the Respondent Could not, If Given the Opportunity, Establish That Regional Director Taylor Exercises Wide Power and Influence Over the C.I.O. Unions in Kentucky.

The C.I.O.'s brief explains briefly the structure of the C.I.O. and the relations of the local unions and the international organizations to the federation (*Amicus* brief, pp. 4-9). This brief, however, throws little light on the role of the C.I.O. regional director, in the affairs of the C.I.O. itself, of the internationals, or of the locals, except that the C.I.O. explains that the regional directors have at no time had any authority or duties with respect to international unions affiliated with the C.I.O. or their local unions including the charging union in this case (*Amicus* brief, p. 8).

Nevertheless, the article from *The C.I.O. News*, October 24, 1949, page 7, from which Respondent has quoted lengthy excerpts (Respondent's brief, pp. 56-59),[4] plainly indicates that the C.I.O. regional director works in close connection with the locals and international in his region and that in fact he exercises considerable power and influence in the affairs of these groups. That article was devoted to outlining the activities of a typical regional director, one, Delmond Garst, the current regional director for Western Missouri and Southern Illinois. In regard to Regional Director Garst's activities it is stated: "Of course, there is close work with the locals and internationals in his area." A typical part of his activities was stated

[4]Excerpts from this article appear in Marx, *American Labor Unions*, 43-45 (1950).

to be taking part in "[n]egotiations for the amalgamated local industrial union" and also, "[n]egotiations for the Woodworkers" as well as "[n]egotiations for other unions when he is requested to enter the picture—which is often." Also, Regional Director Garst was "extremely active in the drive which brought C.W.A. [Communication Workers of America] into the C.I.O.". Also, it is the responsibility of the regional director to do "everything possible to have unions in his area carry out the adopted policies of national C.I.O."[5]

It may be true, as the C.I.O. states (pp. 4-7), that the great bulk of the local unions in the C.I.O. family are not, technically speaking, affiliated directly with the federation itself, but rather are affiliated with the international union organizations which are in turn affiliated with the C.I.O. itself. Nevertheless, the federation and the locals are not strangers to one another. And, indeed, as the article from *The C.I.O. News* makes clear, the locals and the representatives of the federation itself work hand in glove with one another. And the regional directors, as the article states, are the key figures in co-ordinating the activities and in-

[5] See also Chief Judge Parker's remarks in the lower court decision in the *Highland Park* case, 184 F. 2d 98, 100 (4th Cir. 1950):

> "[I]t is perfectly clear that it is much more important to exclude communists and others plotting the overthrow of the government by force from holding office in the great national labor organizations such as the C.I.O. and the A.F.L. than to exclude them from office holding in their affiliates. . . . It is true that it is the officers of the affiliates who call the strikes, but it is the officers of the national or parent organizations who shape labor policies that cause the strikes to be called, and this is particularly true of general strikes or strikes having a political purpose."

terests of the locals with the policies and programs of the federation, for the regional director is the "C.I.O.'s link with local unions."

In view of the foregoing, the claim of the Respondent that Regional Director Taylor "is charged with administrative and executive duties and powers over Local 20 of the Brewery Workers Union, the charging union in this action" (R. 388a-389a), is not "preposterous" as the C.I.O. suggests (*Amicus* brief, p. 14). It is clearly not beyond the realm of possibility, as the C.I.O. seems to imply, that it could be shown that Regional Director Taylor exercises "a working control over every C.I.O. local union and affiliated national union which operates in the Commonwealth of Kentucky and the C.I.O. region" (R. 541a). Respondent, therefore, respectfully submits that the C.I.O.'s insinuation that the respondent really could not, if given the opportunity, prove anything impressive concerning Regional Director Taylor's duties and functions with respect to the C.I.O. locals and international unions operating within Kentucky should not be seriously regarded by this Court.[8]

[8] The C.I.O. urges that it is not certain whether Respondent has been arguing that Regional Director Taylor was an officer of the C.I.O. itself or of the charging local union (*Amicus* brief, p. 14). Respondent has intended to assert that Regional Director Taylor was an officer of the C.I.O. The Respondent sought to show the duties and powers which Taylor exercised over the charging Local 20 of The Brewery Workers as particular evidence that Taylor's post with the C.I.O. reached official stature. The Trial Examiner and the Board plainly understood Respondent's position. The Trial Examiner's report states:

"Respondent offered to show the functions performed by the said Taylor on behalf of the C.I.O. as bearing upon the ques-

(Footnote continued on following page)

III. The C.I.O.'s Argument That the Consequences of a Decision in Favor of the Respondent Are Such That This Court Should Not Affirm the Judgment of the Court of Appeals Is Unimpressive.

The C.I.O. first contends that the possibility of inadvertent compliance by a union with Section 9(h) should induce this Court to rule that an employer should not be able to raise the question of non-compliance in unfair labor practice cases or representation proceedings (*Amicus* brief, p. 16). The suggestion, therefore, is that the Court should prohibit inquiry into the compliance of a union with Section 9(h) because of the chance that a union may not have complied with the law. To state such a proposition is to refute it. It cannot seriously be supposed that Congress intended that this Court should put a premium on carelessness on the part of the union in not fulfilling its obligation under the law. Yet this is substantially what the C.I.O. asks this Court to do. Furthermore, if it is held that parties to an unfair labor case proceeding shall not be permitted to raise the issue of

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tion of whether he was in fact or effect an officer of the C.I.O. within the purview of said subsection (h)" (R. 517a).

The Board observed in its Decision and Order:

". . . . [T]he Respondent contended that W. B. Taylor, the C.I.O. Regional Director in Louisville, Kentucky, exercised administrative and executive duties and powers over Local 20 of the Brewery Workers; that Taylor was in fact an officer of the C.I.O. although not listed as such in its Constitution and bylaws; and accordingly, that Taylor was required under Section 9(h) to file a non-Communist affidavit, which he had not done" (R. 527a).

Nor does the Board now assert that there was any confusion about Respondent's position (see Petitioner's brief, pp. 4, 5).

compliance, careless non-compliance with Section 9(h) may grow into intentional non-compliance.

The C.I.O. also urges that this Court should not hold that Regional Director Taylor was an officer of the C.I.O., because the result would be that many unfair labor practice cases and many representation certifications would be voided as a result of such holding (*Amicus* brief, pp. 17-19). These results may flow from a decision in favor of the Respondent; but it does not follow, as the C.I.O. implies, that the Court should let its decision as to the proper interpretation of Section 9(h) be influenced by such considerations. If this Court believes that the Board under its "constitutional" test fails to do the task which Congress intended that it should do (as Respondent contends), it should strike down this test. This Court in the *Highland Park* case did not hesitate to overturn the Board's ruling that Section 9(h) did not apply to the C.I.O., even though many unfair labor practice charges were thrown out and many representation certifications were necesarily voided (*Amicus* brief, p. 17); and we submit that there is no reason why this Court should now allow such considerations in any wise to affect the decision in this case.

CONCLUSION.

Respondent submits this brief in order to clarify and correct certain misconceptions regarding the issues raised in this case which may have been engendered by the brief of the American Federation of Labor and Congress of Industrial Organizations.

Respectfully submitted,

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No. 79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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CITATIONS

Cases:

National Labor Relations Board v. *Dant*, 344 U. S. 375. 2, 3, 4, 16

National Labor Relations Board v. *Highland Park Manufacturing Company*, 341 U. S. 322 2, 3, 5, 14, 17, 18

Statutes:

National Labor Relations Act, as amended, 61 Stat. 136, 65 Stat. 601, 29 U. S. C. 151, *et seq.*:

Section 9(f) 11, 12, 13, 14, 15, 16, 18, 20

Section 9(g) 11, 12, 13, 14, 15, 16, 18, 20

Section 9(h) 1, 2, 10, 11, 12, 14, 16, 17, 18, 20

Miscellaneous:

House Report No. 1082, 82nd Cong., 1st Sess., p. 1 18

NLRB, *Sixteenth Annual Report*, pp. 42-47 17

NLRB, *Seventeenth Annual Report*, pp. 23-25 17

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INTRODUCTION

This brief *amicus curiae* is submitted by the American Federation of Labor and Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.[1]

This brief is submitted by the AFL-CIO, firstly, because of the importance of the issue involved to all labor organizations and employees covered by the National Labor Relations Act. The holding of the court below, that an employer is entitled to litigate in an unfair labor practice case a claim that the union was not in compliance with Section 9(h) of the Act, affords to employers a ready means of substantially delaying all unfair labor practice cases and representation

[1] Consent was requested and obtained in the name of the CIO. The CIO and AFL have now combined to form the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

proceedings under the National Labor Relations Act. Further, to thus invite employers to litigate issues of union compliance threatens grave injury to unions, since the penalties for non-compliance are severe and "compliance at any given moment, or continuous compliance, [is] a matter of happenstance." *Dant* v. *NLRB,* 344 U. S. 375, 383.

This brief is submitted by the AFL-CIO, secondly, because it has a direct interest in this particular case, since one of the issues sought to be litigated by the respondent is the compliance status of the CIO prior to its combination with the AFL.

This brief is submitted, finally, because we believe that we have special knowledge pertinent to the decision of this case which should be before the Court.

ARGUMENT

The broad issue presented by this case is whether an employer is entitled to litigate in an unfair labor practice case under the National Labor Relations Act, a claim that the unions involved were not in compliance with Section 9(h) of that Act.

This case is an outgrowth of *NLRB* v. *Highland Park Manufacturing Company,* 341 U. S. 322. That was an unfair labor practice case, instituted on a charge by the Textile Workers Union. A majority of the Court there held that the employer was entitled to litigate the question whether compliance with Section 9(h) by the CIO, with which the Textile Workers Union was affiliated, was required in order for the Textile Workers Union to be in compliance. Here the issue which the employer asserts the right to litigate is not whether compliance by a particular labor organization was required, but whether the three labor organizations involved had in fact complied.

More specifically, the respondent seeks to litigate the question whether the omission of one W. B. Taylor to file a

non-Communist affidavit in 1951[2] defeated compliance by (1) the CIO, (2) the International Union of Brewery Workers, and (3) Local 20 of that International, the last being the charging union. In 1951 Taylor was CIO Regional Director for Kentucky, but it is not clear of what organization respondent claims him to have been an officer. (See *infra*, pp. 13-14.)

If this principal procedural question is decided adversely to the Board, there is then presented the substantive issue of the reasonableness of the Board's interpretation of the term "officer" as meaning a person occupying a position identified as an office in a union's constitution or bylaws.[3]

The legal arguments against the right of employers to litigate union compliance in unfair labor practice cases or representation proceedings, and the pertinent legislative history, are fully set forth in the Board's brief, and we shall not repeat them. The Board's brief also stresses the considerations of administrative convenience, or even necessity, which support both (1) its position that issues of compliance may not be litigated in unfair labor practice cases or representation proceedings and (2) its interpretation of the term "officer". We believe that the Court can better evaluate these considerations of administrative necessity if it has before it a brief explanation of the structure and staffing of labor federations and unions. We are encouraged to proffer such an explanation by our belief that the decision of the Court majority in *Highland Park* stemmed at least in part from a misunderstanding of the structure and functions of a labor federation, and by the confusion on this subject evident in the Board's brief in the present case.

Further, we respectfully urge that in deciding whether

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[2] The complaint issued on October 16, 1951 (R. 5c), and that would be the critical date under this Court's decision in *NLRB* v. *Dant*, 344 U. S. 375.

[3] The Board requires affidavits from persons other than those designated as officers in the union constitution only if it has reasonable cause to believe that the union failed to designate a position as an office for the purpose of evading the filing requirements. Bd. Br., p. 49.

union compliance is to be open to employer challenge in unfair labor practice cases and representation proceedings, the Court should take into account the likelihood of inadvertent non-compliance and the severe penalties which are visited upon unions and workers consequent upon a judicial finding of non-compliance. These considerations, we submit, should weigh against encouraging employers to litigate compliance issues in which they normally have only a collateral and adventitious interest. Cf. *NLRB* v. *Dant*, 344 U. S. 375.

Accordingly, we will discuss: (1) The structure of a labor federation, and, in particular, of the CIO as it existed prior to its recent merger with the AFL; (2) The staffing of the CIO prior to merger; (3) The practical consequences of holding that an employer may litigate union compliance in an unfair labor practice or representation proceeding; and (4) The drastic penalties which result to unions and workers from a decision that a union was not in compliance.

I

THE STRUCTURE OF THE CIO

A labor federation, such as the CIO or AFL, or the combined AFL-CIO, is essentially an association of national or international unions.[4] Except in a very limited and special sense, which will be noted later, a federation is not itself a union, but an association of unions. Individual workers are not technically members of a federation but of a union, the unions themselves being in turn the members of the federation. Local unions of national or international unions are similarly not themselves technically members of a federation.

In 1951, and also at the time of its combination with the AFL, the membership of the CIO consisted of: (1) Af-

[4] In practice the terms "international union" and "national union" mean the same thing. Most unions with headquarters in the United States have some Canadian membership. We will use the term "international union".

filiated international unions; (2) Organizing committees; (3) Directly affiliated local unions, known in the CIO as local industrial unions; (4) State and local central bodies, known in the CIO as state industrial union councils and local industrial union councils. The structure of the AFL was similar, except that it had, in addition, a fifth category of members, that is trades departments, such as the Metal Trades Department. The AFL-CIO likewise has trades departments. In some cases these departments have local councils.

1. Affiliated International Unions

The international unions are the core of a federation's membership. In the case of the CIO at the time of the merger, for example, its affiliated international unions had some 5,000,000 members, while the total membership of the local unions directly affiliated with the CIO was only about 14,000. International unions are not subordinates of a federation. They are autonomous unions affiliated with the federation. The other federation members, i.e., organizing committees, directly affiliated local unions, state and local central bodies, and trades departments, are subordinates of the federation.

2. Organizing Committees

Organizing committees are, usually, new unions which have not yet obtained the status of international unions. In *Highland Park,* Justice Douglas, in his dissenting opinion, suggested that with respect to organizing committees "the CIO had control comparable to the power a 'national or international' union exercises over its constituent [local] unions." (341 U.S. 322, at 328.) Actually the CIO often designated the officers of organizing committees, while local unions elect their own officers.

3. Directly Affiliated Locals

The CIO contained a small number of local unions—35 at the time of the 1954 convention—called local industrial

unions, which were not a part of any international union but direct affiliates of the CIO itself. Usually this arrangement existed because there was, at the time, no affiliated international union functioning in the area and jurisdiction which could provide the necessary services to the local.

With respect to these local industrial unions, as with respect to organizing committees, the CIO itself served in effect as an international union. The CIO retained supervision over the affairs of local industrial unions, supplied funds during strikes if necessary, and participated in their collective bargaining. In 1951 there was only one such local in the State of Kentucky, however, and it was not the local union involved in this case, which was a local of the International Brewery Workers Union, CIO.

Thus, except in the special case of directly affiliated locals or of organizing committees, the CIO did not participate in collective bargaining or call strikes. International unions affiliated with a federation, or their local unions, do negotiate agreements and do call strikes. They do so, however, not as divisions or subordinates of a federation, but as self-governing, autonomous, unions.

The Government states in its brief (p. 32, footnote 9):

> "We are informed that the CIO is affiliated with seventeen international unions and eighty-eight local unions in the State of Kentucky."

The formulation that the CIO was affiliated with the international unions is incorrect; rather the international unions were affiliated with the CIO. In the case of local unions, the formulation is additionally incorrect because local unions were not themselves technically affiliated with the CIO except directly affiliated local industrial unions, of which there was only one in Kentucky in 1951 and 1955.

4. State and Local Central Bodies

The state and local CIO industrial union councils were subordinate bodies, which performed on a smaller geo-

graphical scale some, but not all, of the same functions that the CIO performed on the national level. They were comprised of the locals of CIO affiliated international unions, and of any directly affiliated locals, within their particular territory. These CIO state and local councils served as vehicles by which the local unions of a particular geographical area could act together with regard to political, legislative, educational and other matters of general union concern. Unlike the CIO itself, its state and local councils had no organizing functions.

II

STAFF OF THE CIO

Under the CIO Constitution, its ultimate governing body was an annual convention composed of delegates from all its affiliates. Between conventions, authority was vested in the CIO Executive Board, which consisted of the CIO's three executive officers and eight vice presidents plus one representative from each affiliated international union. The executive officers of the CIO—i.e., the President, Executive Vice President, and Secretary-Treasurer—and its eight Vice Presidents had non-Communist affidavits on file when the complaint in this case issued (R. 29a).

In addition to these officers, the CIO had a substantial staff, both at its headquarters in Washington, D. C., and throughout the country. The staff departments of the CIO were Education and Research, Legislative, Legal, International Affairs, Press and Public Relations, Community Affairs, and the Organization Department. Each of these departments was headed by a Director, and normally contained one or more Associate or Assistant Directors, plus variously entitled staff personnel. In addition there existed several CIO committees, composed in most instances of officers of affiliated international unions, and some of these committees, such as the Committee on Civil Rights, had

Directors, or Executive Secretaries, or other staff personnel of their own.

The bulk of the CIO field staff was in the Organization Department, headed by the Executive Vice President. The members of this field staff had a variety of job titles, such as:

(1) Regional Director;
(2) Subregional Director;
(3) Assistant Regional Director;
(4) Organizational Director;
(5) Assistant Organizational Director;
(6) Field Representative;
(7) Special Representative;
(8) Representative.

In 1951 the CIO had 40 individuals, including W. B. Taylor, who were designated as Regional Directors. At that time their duties embraced organizing unorganized workers and servicing state and local councils and any local industrial unions unions in their areas. Neither in 1951 nor at any other time did CIO Regional Directors have any authority over or duties with respect to international unions affiliated with the CIO, or their local unions, such as Local 20 of the Brewery Workers Union, the charging union in this case. In 1951 a CIO Director might have been concerned with the organizing of such a local union but his duties with respect to it would have terminated upon its being chartered by an international union. In 1953 the field staff was reorganized, the number of Regional Directors was reduced to thirteen, and their responsibilities for organizing were eliminated.

In addition to changes of this sort in the duties attached to particular staff positions, the job assignments of the various persons on CIO field staff were changed with considerable frequence. Thus the personnel file of W. B. Taylor discloses the following list of assignments:

April 1, 1943-January 1, 1946—On loan to the Oil Workers International Union, CIO, as director of its organizing drive;

February, 1946-August, 1946—Designated as "CIO Representative" and on loan to United Gas, Coke and Chemical Workers of America, CIO, as director of its organizing drive;

September, 1946 - December, 1946—Designated as "CIO Field Representative" and assigned to Railroads;

December, 1946-June, 1953—"CIO Regional Director", Louisville, Kentucky;

July, 1953[5]-January, 1955—Designated as "Special Representative" and assigned successively to different organizing projects in various parts of the country;

January, 1955—Designated as "Representative" and assigned to an Organizers Pool to be available "for any situation that may arise";

September, 1955—Granted leave of absence for job with International Cooperation Administration in Indonesia.

The structure and staffing of the international unions affiliated with the CIO in general resembles that of the CIO itself. In the case of some of the larger unions, however, the structure is more complex and the staffs larger than was the case with the CIO.

The structure of local unions is, of course, considerably simpler, and only the larger local unions have any paid staff. Even in the case of a relatively small local, however, such as that here involved, eleven different persons were classified as officers and non-Communist affidavits were filed for them (R. 28a).

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[5] This change of assignment resulted from the reorganization of the CIO regional office structure referred to above.

III

TO HOLD THAT AN EMPLOYER MAY LITIGATE COMPLIANCE IN AN UNFAIR LABOR PRACTICE PROCEEDING WOULD INVITE ENDLESS DELAY

As the foregoing description shows, a labor federation such as the CIO, has a complicated organizational structure and a complicated and constantly changing staff structure. Thus if it were held that employers are entitled to litigate in unfair labor practice cases or representation proceedings any issues they choose to raise as to the "officer" status of union employees, they would have a ready device for delaying any and every Labor Board proceeding. Under the decision below, whenever an employer claims that a particular individual has, or had at some past time, the status of a union officer, it would be necessary "to introduce testimony as to the functions and extent of jurisdiction of said" person (R. 541a).

The Board states in its brief (Br., p. 35):

> "Moreover, if evidence could be adduced as to one individual, the same issue could be raised as to virtually every person performing any duties for the charging union, its international and every other affiliated union (see *infra*, p. 61)."

More accurately, the same issue could be raised as to virtually every person performing any duties for the charging local union, its international, and any federation with which the international was affiliated. And as we have shown, the structure of labor organizations is so complicated and they have such a wide variety of officials, functionaries, and staff positions, and these change with such frequency, that an employer who wished to litigate compliance could always find some nominally new issue. Further, as pointed out in the Board's brief, pp. 36-39, if the issue of compliance with Section 9(h) is litigable in unfair labor practice cases and representation proceedings at an employer's instance, ques-

tions of compliance with 9(f) and 9(g) are presumably also litigable, which would open up an even broader field.

The only motives which would normally lead an employer to litigate issues of union compliance are (1) delay, and (2) the hope of uncovering some technical or inadvertent non-compliance that would defeat the processing of the unfair labor case or representation proceeding. The conduct of the employer in this very case shows the sort of fishing expedition that would be invited by a ruling that employers may litigate union compliance.

Thus, shortly after the filing of the charge, and before a complaint was even issued by the General Counsel (R. 13a) counsel for the respondent wrote the Board inquiring as to the compliance status of the three labor organizations —Local 20, the International Union of Brewery Workers, and the CIO—under Section 9(f), Section 9(g) and Section 9(h) of the Taft-Hartley Act. He was informed that the material relating to compliance might be inspecteed at the Board's office (R. 25a). Pursuant to this correspondence, counsel for the respondent appeared at the Board office in July 1951 and inspected the non-Communist affidavits filed by the three organizations (R. 387a). (The data required to be filed under Section 9(f) and (g) is filed with and kept at the Department of Labor.)

When the complaint issued, the respondent moved to dismiss it on the grounds that it did not affirmatively allege that (1) the Local Union, (2) the international union, and (3) the CIO, are and at all relevant times were in compliance with Section 9(f), (g) and (h). The motion also alleged as grounds for dismissing the complaint that copies of all of the compliance documents relating to Section 9(f), (g) and (h) had not been filed as part of the record in the case and furnished to the respondent (R. 7a-10a).

When the motion to dismiss the complaint was denied (R. 11a-12a) the respondent filed an answer, alleging that

neither Local 20, nor the International Union, nor the CIO (R. 13a-14a):

> "have filed and now have on file with the Secretary of Labor of the United States of America any or all of the documents, statements, material and data required by subsections (f) and (g) of Section 9 of the Labor-Management Relations Act of 1947, and that each of the respective officers of said organizations (including W. B. Taylor, Regional Director of the Congress of Industrial Organizations in Kentucky) has not executed and filed with the National Labor Relations Board, and does not now have on file with said Board, the affidavits required by subsection (h) of Section 9 * * *."

And this answer went on to assert "that the Respondent is entitled to inspect and examine, and to have filed in the record of this case," all of the records and documents relating to compliance (R. 14a).

Next, in January 1952, counsel for respondent reappeared at the Board office, and asked to examine the compliance files of the three unions again (R. 389a-390a). This time the request was denied. (Id.)

Respondent's counsel then wrote the General Counsel of the Board requesting detailed information as to the compliance by the three labor organizations with the three sections of the Act (R. 26a-27a). In reply the Board furnished the respondent with a list of the names of the officers of the three organizations who had filed the non-Communist affidavits (R. 27a-29a).

Next, the respondent secured subpoenas directed to the Chairman of the Board and to its Regional Director requiring them to produce the non-Communist affidavits filed by the officers of the three organizations (R. 30a-31a). He likewise issued a subpoena directed to the Secretary of Labor requiring him to produce the compliance documents filed by

the three unions under Section 9(f) and (g) of the Act (R. 31a-32a). These subpoenas were subsequently revoked by the trial examiner (R. 387a) on the ground that the company was not entitled to litigate the union's compliance in an unfair labor practice proceeding.

Finally, at the hearing counsel for respondent stated (R. 388a-389a):

> "* * * that as regional director of the Congress of Industrial Organizations, W. B. Taylor is charged with administrative and executive duties and powers over Local 20 of the Brewery Workers Union, the charging union in this action."

To this, Board Counsel responded (R. 389a):

> "General Counsel would like to state at this point, before going into the ex parte statement by counsel for respondent, there is no evidence of any duties that W. B. Taylor may have with respect to the Local. Furthermore, I would like to state for the record that the said W. B. Taylor was in attendance at the hearing, I believe during the first two or three days, and of course was available for questioning."

Counsel for the respondent answered (R. 389a):

> "* * * I want to say that I am able to testify to those facts of my own knowledge as a result of investigation that I have made of those facts, and I offer so to do; * * *."

In its decision the Board states that respondent contended that "Taylor was in fact an officer of the CIO." (R. 527a.)

In its judgment the Court of Appeals states that at the hearing (R. 541a):

> "Respondent offered to show that said W. B. Taylor is an officer of the CIO, that he exercises administrative and executive powers over United Brewery and Soft Drink Workers Local 20, *and exercises a working*

control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region;" [Italics added]

The statements that respondent asserted to show that Taylor "is an officer of the CIO" are not precisely correct. Respondent's contentions both at the hearing and in its pleadings left it unclear whether respondent was asserting that Taylor was an officer of the CIO or of Local 20.

The italicized statement by the Court of Appeals is entirely incorrect: respondent made no such offer of proof.

As best we can ascertain, the italicized statement was taken by the court below from the respondent's brief before it, at p. 84.[6] The statement is as unsupported in the record as it is preposterous.

The court below ordered the case remanded to the Board (R. 541a):

> "with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO * * *."

It is not clear what disposition the court intended to make of the respondent's claim to litigate compliance with 9(f), (g) and (h) by the three labor organizations generally, or of the subpoena issue.

But it is clear that if employers are accorded the right to litigate a union's compliance status, no Board proceeding will ever be brought to a timely culmination.

The facility with which employers could indefinitely delay Board proceedings if entitled to litigate union compliance is, of course, increased by this Court's decision in *Highland Park*. Under that ruling, if an employer is entitled to litigate the issue of union compliance at all, he could raise it not only as to the charging local union and

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[6] Similar statements are contained in respondent's Brief in Opposition, p. 4, and in the Board's brief in this Court, p. 4.

its international union, but with respect to the federation with which the local's international union is affiliated. In the view of the Board and the court below, that is what respondent did here.

Thus in nearly every Board case or proceeding, the employer could litigate the whole subject of the structure and staffing of the AFL-CIO, simply upon an assertion that some employee of the federation who had not filed a non-Communist affidavit was an "officer" of the federation. If respondent's claim is that Taylor was an officer of the CIO, it is not material to that claim that Taylor was stationed in Kentucky. Such a claim could as well have been urged as to almost any CIO employee, anywhere.

An employer could, of course, with equal facility, raise issues as to officer status in international unions or local unions, though in the latter case the delaying potential of the issue would be much smaller. Finally, he could also litigate as to the sufficiency of the organizational and financial data filed under Sections 9(f) and (g) by the federation, by the international union, and by the local union.

To hold that an employer is entitled to litigate union compliance in an unfair labor practice case or representation proceeding thus would result in bogging down all Board proceedings in a miasma of basically collateral and irrevelant inquiries.

IV

THE COURT SHOULD TAKE INTO ACCOUNT THE SEVERE PENALTIES CONSEQUENT UPON EVEN INADVERTENT NON-COMPLIANCE

We respectfully submit that, in deciding whether employers may litigate union compliance in unfair labor practice cases or representation proceedings, the Court should take into account (1) the likelihood of inadvertent non-compliance, (2) the disastrous consequences which result

to unions and to employees from any holding that the union was not in compliance, and (3) that the independent, collateral proceeding established by the Board for investigating compliance avoids the temptation to employers to litigate compliance simply for delay. All these considerations, we submit, should weigh against according to employers the right to litigate issues of compliance in unfair labor practice cases or representation proceedings.

1. This Court is aware of the likelihood of inadvertent non-compliance by unions with the requirements of Section 9(f), (g) and (h). In *NLRB* v. *Dant* 344 U.S. 375, 380, the Court said:

> "As a practical matter, elections of new officers, changes in organizational structures, difficulties and delays in auditing financial statements or in obtaining information with respect to the numerous details which §9(f) and (g) requires, makes compliance at a given moment, or continuous compliance, a matter of happenstance."

Therefore, to minimize the consequences of non-compliance with Section 9(h), the Court ruled that the crucial date for compliance in unfair labor practice cases is the issuance of the complaint rather than the filing of the charge. The Court said, p. 380:

> "Such normal non-compliance at the time of filing a charge should not work to frustrate the Act's purpose of remedying unfair labor practices committed against unions which do have leadership willing to comply."

We respectfully urge that same policy of minimizing the drastic consequences of inadvertent non-compliance here supports interpreting the Act as not entitling employers to litigate union compliance in unfair labor practice cases or representation proceedings.

2. Let us look at the consequences which would attend a judicial determination, in a case like this, that at some past date the CIO was not in compliance because some staff member who, in the Court's view, should have filed an affidavit, did not. This is not a matter on which we need speculate, for we have had the actual experience of this Court's decision in the *Highland Park* case.[7]

As far as the prospective operation of the *Highland Park* decision was concerned it had none, since the CIO had complied with 9(h) before the decision. But the retroactive results of the decision were drastic.

The decision had the effect, first, of invalidating all complaints in unfair labor practice cases which had been issued pursuant to charges filed by CIO affiliates in the period prior to CIO compliance. Some 40 unfair labor practice complaints were in consequence dismissed by the Board and the courts. Many of these cases had been pending for years and in most of them no issue of CIO compliance had ever been raised by the employer.

The *Highland Park* decision had the effect, secondly, of invalidating all certifications as collective bargaining representative which had been issued to CIO affiliated international unions, or their local unions, during the period when the CIO was, as this Court held, not in compliance. We have no estimate of the number of such certifications, but it was large. Thirdly, the decision invalidated all union shop authorization certificates issued to CIO affiliates, or their locals, prior to the CIO compliance.

So far reaching and so unjust were these consequences that the Congress, with a unanimity never attained before or since on the controversial subject of Taft-Hartley, passed a special act, jointly sponsored by Senators Taft and Humphrey, to mitigate some of these consequences of the *High-*

[7] See Sixteenth Annual Report of the NLRB, pp. 42-47; Seventeenth Annual Report, pp. 23-25.

land Park decision.[8] This Act—the only amendment to Taft-Hartley since its enactment in 1947—provided in part:

> "Sec. 18. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9(f), (g), or (h) of the aforesaid Act prior to December 22, 1949, * * *." (Public Law 189, 82nd Congress, 1st Session, Approved October 22, 1951.)[9]

Congress thus validated the numerous representation certifications of CIO affiliated unions which would otherwise have been voided by the *Highland Park* decision. It did not, however, reinstate the 40 unfair labor practice complaints which had been dismissed in consequence of that decision.

Any decision in a case like the present holding that the CIO was at some past date not in compliance would have approximately the same drastic consequences as did this Court's *Highland Park* decision. It would void every unfair labor practice complaint issued during the period of non-compliance pursuant to a charge filed by (1) the CIO, or (2) an international union affiliated with the CIO, or (3) a local union of such an international union. And it would likewise invalidate all representation certifications issued during the period of non-compliance to a labor organization in any of these categories.

Any decision hereafter that the new merged federation, the AFL-CIO, was not in compliance at some date would have even wider consequences. For such a decision would

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[8] See Senate Report No. 646, 82nd Congress, 1st Session; House Report No. 1082, 82nd Congress, 1st Session. The latter states, p. 1: "The purposes of the bill are (1) to resolve problems arising from a recent Supreme Court decision, *National Labor Relations Board* v. *Highland Park Manufacturing Company* * * *."

[9] This Act also abolished union shop authorization elections.

mean not only that the federation was itself not in compliance, but that all of its affiliated unions and all of their local unions were out of compliance.

We respectfully urge that the litigation of compliance issues, in view of its potential of mischief, should not be unnecessarily expanded or encouraged by according to employers the right to raise such issues in unfair labor practice cases and representation proceedings.

3. The independent, collateral, proceeding established by the Board for the investigation of compliance questions is fully described in the Board's brief, pp. 5-7, 39-45. A determination adverse to a union in such a proceeding would presumably have the same deleterious consequences as an adverse determination in an unfair labor practice case or representation proceeding.

However, this separate collateral proceeding has the great advantage that an employer has no incentive to resort to it simply for delay, since any pending unfair labor practice case or representation proceeding involving the employer will be processed normally and independently of the compliance investigation.

CONCLUSION

For the reasons stated, and for those set forth in the Board's brief, we respectfully urge that the Court rule that an employer may not litigate issues of union compliance in an unfair labor practice case or representation proceeding. Otherwise employers will be encouraged to litigate compliance issues simply to delay Board unfair labor practice cases and representation proceedings. Further, the resulting volume of compliance litigation would threaten unions with grievous injury because of the increased likelihood of at least an occasional adverse determination on a compliance issue.

Acceptance of the Board's definition of the term "officer" would eliminate much of the litigation which would other-

wise result from allowing employers to litigate union compliance with Section 9(h) in unfair labor practice cases or representation proceedings; but it would not at all meet the problems which would arise from permitting employer litigation of compliance with Sections 9(f) and (g) in such cases or proceedings.

We therefore urge that the decision of the court below be reversed on the ground that employers may not litigate compliance issues in unfair labor practice cases.

Respectfully submitted,

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